SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 124

NATIONAL LEAD COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in the Tax Court of the United States	1	1
Amendment to petition for review	1	1
Answer to amendment to petition for review	7	3
Stipulation of Facts No. 6	8	3
Exhibit 6-A—War Production Board Necessity Certificate No. 1893	15	8
Exhibit 6-B—War Production Board Necessity Certificate No. 6298	15	8
Exhibit 6-C—War Production Board Necessity Certificate No. 6298-A-3	16	8
Exhibit 6-D—War Production Board Necessity Certificate No. 6298-A-4	16	8
Exhibit 6-E—Affidavit of Sidney T. Thomas, Chief, Tax Amortization Branch, Civilian Production Administration	17	9
Exhibit "A"—Report of Under Secretary of War to Secretary of War on the administration of Section 124 of the Internal Revenue Law relating to the issue of necessity certificates	30	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUG. 21, 1956

—888-8

	Original	Print
Proceedings in the Tax Court of the United States—Continued		
Stipulation of Facts No. 6—Continued		
Exhibits—Continued		
Exhibit "F"—Memorandum from Facilities Bureau, Deputy Director for Tax Amortization of War Production Board to Industry Divisions, War Production Board, et al.	62	45
Exhibit "G"—Circular Series Supplement No. 1 to General Program Circular from War Production Board to All Bureau and Division Directors	65	47
Opinion, Murdock, J.	72	52
Decision	75	55
Proceedings in the United States Court of Appeals for the Second Circuit	76	56
Petition for review	76	56
Opinion, Lumbard, J.	78	57
Judgment	85	63
Petition for rehearing (omitted in printing)	85A	
Per curiam order denying petition for rehearing	87	64
Order denying petition for rehearing	88	64
Clerk's certificate (omitted in printing)	89	
Order allowing certiorari	90	64

[fol. 1] [File Endorsement Omitted]

THE TAX COURT OF THE UNITED STATES

NATIONAL LEAD COMPANY, Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

AMENDMENT TO PETITION—Filed April 9, 1954

The petition is hereby amended by striking out the present paragraph (4)(e), appearing at pages 3 and 4, and inserting in lieu thereof the following:

* * * * * * *

"(f) The Commissioner erred in failing and refusing to determine that the petitioner is entitled, under section 23(t) of the Internal Revenue Code, to additional deductions from gross income, for the calendar year 1944, in the aggregate amount of $121,047.24, in respect of certain emergency facilities with respect to which certifi-
[fol. 2] cates had been duly made under section 124(f) of the Internal Revenue Code.

* * * * * * *

The petition is hereby further amended by striking out the present paragraph (5)(e), appearing at page 15, and inserting in lieu thereof the following:

* * * * * * *

[fol. 3] "(1) During or prior to the calendar year 1944, there were duly made and issued to the petitioner, under the authority of section 124 of the Internal Revenue Code, certificates, numbered N.C. 1893, N.C. 6298A-3, and N.C. 6298A-4, relating to certain emergency facilities.

"(2) Each of the aforesaid certificates purported
[fol. 4] to apply to percentages, less than 100%, of the cost of the facility or facilities to which the certificate related. In the case of certificate N.C. 1893,

said percentage was 50%; and in the case of certificates N.C. 6298A-3 and N.C. 6298A-4, said percentage was 35%.

"(3) The aggregate cost of the facility or facilities to which the aforesaid certificate N.C. 1893 related was $497,821.12; and the aggregate cost of the facilities to which the aforesaid certificates N.C. 6298A-3 and N.C. 6298A-4 related was $15,338.60 and $154,422.21, respectively.

"(4) For the calendar year 1944, the Commissioner treated as deductions allowable to the petitioner, under section 23(t) of the Internal Revenue Code, in respect of the facilities to which the aforesaid certificates related, the aggregate amount of $113,259.95, such amount being computed by restricting the application of said section 23(t) to the percentages of cost of said facilities to which said certificates purported to be limited.

"(5) For the calendar year 1944, the deductions allowable to the petitioner, under section 23(t) of the Internal Revenue Code, in respect of the facilities to which the aforesaid certificates related, aggregated $234,307.19, computed by applying said section 23(t) to the entire cost of said facilities.

* * * * * * *

[fols. 5-6] Karl Riemer, Lawrence S. Lesser, Pehle, Lesser, Mann, Riemer & Luxford, 1210 Eighteenth Street, N. W., Washington 6, D. C., Counsel for Petitioner.

[fol. 7] [File Endorsement Omitted]

THE TAX COURT OF THE UNITED STATES

[Title Omitted]

ANSWER TO AMENDMENT TO PETITION—Filed May 28, 1954

Comes now the respondent, by his attorney, DANIEL A. TAYLOR, Chief Counsel, Internal Revenue Service, and for answer to the amendment to petition heretofore filed in this proceeding denies as follows:

(4)(e) to (4)(h), inclusive. Denies that the respondent erred as alleged in subparagraphs (4)(e) to (4)(h), inclusive, of the amendment to petition.

(5)(e)(1) to (5)(h), inclusive. Denies the allegations contained in subparagraphs (5)(e)(1) to (5)(h), inclusive, of the amendment to petition.

Denies generally and specifically each and every allegation contained in the amendment to petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

Daniel A, Taylor, Chief Counsel, Internal Revenue Service.

Of Counsel: Arthur B. White, Regional Counsel; Harold D. Thomas, Assistant Regional Counsel; James E. Markham, Jr., Special Attorney, Internal Revenue Service.

[fol. 8] THE TAX COURT OF THE UNITED STATES

[Title Omitted]

STIPULATION OF FACTS No. 6

With respect to the issue joined by the respondent's denial of the allegations of paragraphs (4)(f) and (5)(f) of the petition (as amended), it is hereby stipulated and agreed by and between the parties hereto through the

undersigned, their respective attorneys, that the following facts are true, and may be incorporated by the Court in its findings of fact, subject to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be true:

[fol. 9] (1) The National Lead Company (herein sometimes called "National Lead"), the petitioner in this proceeding, is a corporation organized in 1891 and existing under the laws of the State of New Jersey. At all times material herein, National Lead has been one of the principal producers in the United States of alloys and mixed metal products suitable for use in the manufacture of industrial bearings, including bearings for railway car journals, for diesel and steam engines, and for other industrial purposes; and either directly or through the instrumentality of wholly—or majority-owned subsidiary corporations, has been engaged in the manufacture and sale of such bearings.

(2) For some years prior to 1944, the American Bearing Corporation (herein sometimes called "American Bearing"), a corporation organized in 1935 and existing under the laws of the State of Indiana, was engaged on its own account in the manufacture and sale of industrial bearings, especially precision bearings for diesel and steam engines, and in the production of certain machinery for its own use.

(3) On or about May 3, 1935, National Lead acquired, by purchase, 1,000 of the 1,700 authorized, issued, and outstanding shares of the $7 preferred stock of American Bearing; on or about December 22, 1936, National Lead acquired, by purchase, 320 additional shares of the $7 preferred stock of American Bearing; and on or about February 8, 1944, National Lead acquired, by purchase, the remaining 380 shares of the $7 preferred stock of American Bearing. On or about May 3, 1935, National [fol. 10] Lead acquired, by purchase, 600 of the 1,000 authorized, issued, and outstanding shares of common stock of American Bearing; and on or about February 8, 1944, National Lead acquired, by purchase, the remaining 400 shares of the common stock of American Bearing, thereby becoming the owner of all the authorized, issued, and outstanding stock of any class of American Bearing. On or about June 30, 1944, National Lead caused American Bear-

ing to be liquidated and dissolved, in a transaction qualifying as nontaxable under the provisions of section 112(b)(6) of the Internal Revenue Code. From and after June 30, 1944, the business previously conducted by American Bearing was conducted by National Lead, as a division, under the name of National Lead or under the name of "American Bearing Corporation".

(4) On February 1, 1944, American Bearing filed, with the War Production Board, an application for a certificate of necessity covering the cost of constructing, acquiring and installing certain facilities, including buildings and machine tools, for the purpose of producing bronze back, heavy wall bearings for heavy duty diesel and steam engines. On February 5, 1944, the War Production Board, pursuant to section 124 of the Internal Revenue Code, issued to the Commissioner of Internal Revenue Necessity Certificate No. NC-1893 in respect of the aforesaid facilities. A correct copy of said Necessity Certificate is attached hereto as Exhibit 6-A. As indicated thereon, said certificate purported to be limited to 50 per cent of the cost of the aforesaid facilities.

[fol. 11] (5) On June 27, 1944, American Bearing filed, with the War Production Board, an application for a certificate of necessity covering the cost of constructing, acquiring, and installing certain facilities, including buildings and furnaces, for the purpose of producing centrifugal cast bronze backs for diesel bearings. On June 30, 1944, the War Production Board, pursuant to section 124 of the Internal Revenue Code, issued to the Commissioner of Internal Revenue Necessity Certificate No. NC-6298 in respect of the aforesaid facilities. A correct copy of said Necessity Certificate is attached hereto as Exhibit 6-B. As indicated thereon, said certificate purported to be limited to 35 per cent of the cost of the aforesaid facilities.

(6) Pursuant to application filed by National Lead after June 30, 1944, the War Production Board, on September 26, 1944, and pursuant to section 124 of the Internal Revenue Code, issued to the Commissioner of Internal Revenue Necessity Certificate No. NC-6298-A-3, covering the cost of acquiring and installing certain additional facilities (machine tools) for the purpose of the project referred

to in paragraph (5). A copy of said Necessity Certificate is attached hereto as Exhibit 6-C. As indicated thereon, said certificate purported to be limited to 35 per cent of the cost of the aforesaid facilities.

(7) Pursuant to application filed by National Lead after June 30, 1944, the War Production Board, on November 2, 1944, and pursuant to section 124 of the Internal Revenue Code, issued to the Commissioner of Internal Revenue [fol. 12] Necessity Certificate No. NC-6298-A-4, covering the cost of acquiring and installing certain additional facilities (furnaces) for the purpose of the project referred to in paragraph (5). A copy of said Necessity Certificate is attached hereto as Exhibit 6-D. As indicated thereon, said certificate purported to be limited to 35 per cent of the cost of the aforesaid facilities.

(8) American Bearing or National Lead, as the case may have been, duly proceeded to construct, reconstruct, erect, install, or acquire the facilities to which Exhibit 6-A related. The final cost of said facilities, as audited by the respondent, was $497,821.12.

(9) The petitioner concedes that it is not entitled to any deduction not previously allowed, and applicable to any period ending on or before June 30, 1944, in respect of the facilities covered by Exhibit 6-A.

(10) For the portion of the calendar year 1944 subsequent to June 30, the respondent failed and refused to allow to National Lead, as a deduction under section 23(t) of the Internal Revenue Code, in respect of the facilities covered by Exhibit 6-A, any amount in excess of an amount computed in accordance with the purported 50 per cent limitation appearing on the face of said Exhibit 6-A. Said amount so computed and allowed as a deduction was $92,215.89. If no such percentage limitation is applicable, the petitioner is entitled to a further deduction of $92,215.89 for the portion of the calendar year 1944 subsequent to June 30, which further deduction the re- [fol. 13] spondent has failed and refused to allow. The correctness of said failure and refusal is the issue to which this stipulation is addressed (see also paragraph (12)).

(11) National Lead duly proceeded to construct, reconstruct, erect, install, or acquire the facilities to which Ex-

hibits 6-B, 6-C, and 6-D related. The final cost of said facilities, in the aggregate and as audited by the respondent, was the sum of $183,296.81.

(12) For the portion of the calendar year 1944 subsequent to June 30, the respondent failed and refused to allow to National Lead, as a deduction under section 23(t) of the Internal Revenue Code, in respect of the facilities covered by Exhibits 6-B, 6-C, and 6-D, any amount in excess of an amount computed in accordance with the purported 35 per cent limitation appearing on the face of said Exhibits 6-B, 6-C, and 6-D. Said amount so computed and allowed as a deduction was $9,085.17. If no such percentage limitation is applicable, the petitioner is entitled to a further deduction of $16,872.46 for the portion of the calendar year 1944 subsequent to June 30, which the respondent has failed and refused to allow. The correctness of said failure and refusal is the issue to which this stipulation is addressed (see also paragraph (10)).

(13) If the percentage limitations referred to in paragraphs (10) and (12) above are not applicable, and the petitioner is entitled to the further deductions under section 23(t) of the Internal Revenue Code set forth in said [fol. 14] paragraphs, the petitioner concedes that its aggregate deduction for depreciation, under section 23(1) of the Internal Revenue Code, for the calendar year 1944, should be reduced by $12,033.07.

(14) Attached hereto as Exhibit 6-E is a correct copy of an excerpt from the record, in the United States Court of Claims, in the case of *Wickes Corp. v. United States* (108 Fed. Supp. 616), which excerpt sets forth the reasons for the percentage limitations appearing on the face of Exhibits 6-A, 6-B, 6-C, and 6-D.

(15) At the time of this hearing, it is impossible for the respondent and the petitioner to verify the precise dates of the beginning of construction, acquisition, or installation of the facilities referred to in this stipulation. The petitioner will submit information relating to said dates for verification by the respondent and submission to the Court.

(S) Karl Riemer, (S) Floyd F. Toomey, Attorneys for Petitioner. (S) Daniel A. Taylor, Attorney for Respondent.

(Here follow 2 Photolithographs, side folios 15, 16)

Exhibit 6-A

8A

FORM GA-1239 (1-4-44)
R

UNITED STATES OF AMERICA
WAR PRODUCTION BOARD

NECESSITY CERTIFICATE

DATE

SC 1897

To The Commissioner of Internal Revenue:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

NAME AND ADDRESS OF APPLICANT (Street, City, Zone, State)

American Bearing Corporation
429 S. Harding Avenue
Indianapolis, Indiana

IT IS HEREBY CERTIFIED that the facilities described in the attached Appendix A (consisting of three pages) are necessary in the interest of national defense during the emergency period, up to 50 % of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, and that the application for this Certificate was filed on February 1, 1944.

WAR PRODUCTION BOARD

By [signature]
Recording Secretary

FEB -5 1944

SIGNATURE

(1147)—War Board 0234—p. 1

Exhibit 6-B

FORM GA-1239 (2-4-44) R	UNITED STATES OF AMERICA WAR PRODUCTION BOARD	DATE	RE - 6298

NECESSITY CERTIFICATE

To The Commissioner of Internal Revenue:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

NAME AND ADDRESS OF APPLICANT (Street, City, Zone, State)

American Bearing Corporation
429 So. Harding Street
Indianapolis 7, Indiana

IT IS HEREBY CERTIFIED that the facilities described in the attached Appendix A (consisting of 2 pages XXXXXXXXXXXXXX) are necessary in the interest of national defense during the emergency period, up to 25 % of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, and that the application for this Certificate was filed on June 27, 1944.

WAR PRODUCTION BOARD

By [signature] Secretary

JUN 30 1944

(1944—War Board 1234—p 1

818

Exhibit 6-C

FORM GA-1239 (10-11-44) R	UNITED STATES OF AMERICA WAR PRODUCTION BOARD	Date	NC -
	NECESSITY CERTIFICATE	Sept. 26, 1944	6298-A-3

To The Commissioner of Internal Revenue:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

NAME AND ADDRESS OF APPLICANT (Street, City, Zone, State)

American Bearing Corporation
429 S. Harding Street
Indianapolis 7, Ind.

IT IS HEREBY CERTIFIED that the facilities described in the attached Appendix A (consisting of 2 pages X X X

Exhibit 6-D

FORM GA-1239 (10-11-44) R	UNITED STATES OF AMERICA WAR PRODUCTION BOARD	DATE	NC -
	NECESSITY CERTIFICATE		6298-A-4

To The Commissioner of Internal Revenue:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

NAME AND ADDRESS OF APPLICANT (Street, City, Zone, State)

American Bearing Corporation
429 S. Harding Street
Indianapolis, 7, Indiana

IT IS HEREBY CERTIFIED that the facilities described in the attached Appendix A (consisting of 2 pages XXXXXXXXXXXXXXXXXX) are necessary in the interest of national defense during the emergency period, up to 25 % of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, to the extent that such construction, reconstruction, erection or installation is begun or such acquisition is effected within 60 days after the issuance date of this certificate.

WAR PRODUCTION BOARD
By _____
RECORDING SECRETARY

NOV 2 1944

B-43000

[Appendices describing facilities are omitted]

[fol. 17] Exhibit 6-E—Filed Dec 30 1946

AFFIDAVIT OF SIDNEY T. THOMAS, CHIEF, TAX AMORTIZATION BRANCH, CIVILIAN PRODUCTION ADMINISTRATION

CITY OF WASHINGTON, DISTRICT OF COLUMBIA, SS:

I, Sidney T. Thomas, being duly sworn, do hereby depose and say:

1. I am the duly appointed Chief of the Tax Amortization Branch of the Civilian Production Administration and prior to that was Acting Chief of said branch of the War Production Board since December 26, 1943.

2. In that position, I have been delegated authority by the Chairman of the War Production Board and his successor the Administrator of the Civilian Production Administration,[1] to consider applications for Necessity Certificates and to issue Necessity Certificates or to disapprove of such applications, in accord- with the policies and regulations established by the Chairman of the War Production Board and the Administrator of the Civilian Production Administration under Section 124 of the Internal Revenue Code.

3. The statements made in this affidavit are based upon information received by me in my official capacity and which I believe to be true and accurate.

4. In order to give the necessary background of the tax amortization program, I quote from the Report of the then Under Secretary of War Robert P. Patterson to the [fol. 18] Secretary of War dated 10 March 1945, copy of which is attached marked Exhibit A. As stated by Under Secretary of War Patterson:

At the beginning of our rearmament program in 1940, industry was hesitant to accept contracts whose completion would require the use of private capital for creation of new facilities. Since we were not at war, and the future of the defense program hinged upon events and policies

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[1] The functions of the War Production Board were transferred to the Civilian Rroduction Administration by Executive Order 9638 dated October 4, 1945.

which could not be predicted with any certainty, industry could not ignore the possibility that conversions and expansions undertaken for defense purposes might not be kept in operation long enough to repay their cost, if the usual rate of amortization was employed. The hesitancy which this provoked was increased by two other factors, (1) the stringency with which the existing revenue laws treated facility costs in computing income, and (2) the prospect of greatly increased rates of taxation. Not only were these rates likely to increase, but no one could say exactly when or by how much.

In the light of these uncertainties the hesitancy of industry was understandable. At the same time, speedy plant expansion and conversion were vital military necessities. Something had to be done to reconcile financial prudence with urgent military need. To bring this about some assurance was needed that, in computing income, special allowance would be made for the possibility that war facilities would become useless before the expiration of their normal life. In view of the probability that earnings would be high for a brief period, and then might drop, it seemed only fair to permit the cost of the facilities to be taken out of the high income during the period in which it was being earned.

In addition, there was every indication that Congress would provide a very high excess profits tax to [fol. 19] cover the period of maximum earnings. This tax policy threatened to prevent a company accumulating enough surplus to absorb the portion of the cost of the facilities which remained unabsorbed at the cessation of war production. Even patriotism could not reasonably be expected to include a contractor to court bankruptcy by tying up a large portion of his capital, much of it borrowed, in factory expansion which might suddenly become valueless. Some means had to be devised to allow the return of the cost of their expansion to the contractor while the expanded facilities were being used in war production.

On May 26, 1940, the President called upon private industry for help in rearmament and recognized that, in view of a possible curtailment of order within a year or two, private industry could not be expected to assume

all the financial risks of this expansion. In a report of the Committee on Ways and Means of the House of Representatives on June 10, 1940, (Report No. 2491) made in connection with a revenue bill then under consideration, it was stated that proposals had been made to provide special amortization for national defense industries and to impose excess profits tax. The two proposals were to be considered as interdependent. A press release from the White House on July 10, 1940 announced that it had been decided to incorporate in the excess profits tax bill, which was soon to be introduced, a provision for amortization over a five-year period of national defense.

5. The passage of Section 124 of the Internal Revenue Code and its subsequent amendments then followed.

6. Many of the procedures and policies followed by the War Production Board in administering Section 124 [fol. 20] were the necessary outgrowths of those established by the War and Navy Department during the primary administration of the law prior to December 17, 1943.

7. As required by the statute, the Secretaries of War and Navy issued from time to time regulations governing the issuance of Necessity Certificates. First, in time, was the regulation of May 22, 1942 approved by the President and later amended with the approval of the President on February 1, 1943. A copy of the regulation, as amended, is attached and marked Exhibit B.

8. During this period the purpose of the program was to get the plants built and devoted to war work in view of the great shortage of capital equipment to meet war needs. The guides to be followed in determining the issuance of Necessity Certificates included such factors as the type of supplies to be manufactured, the time of acquisition, whether in fact a definite shortage of capacity in plant existed, the purpose of the acquisition and related matters.

9. By the spring of 1943, as stated by the Under Secretary of War Patterson in his report:

It was becoming apparent that the chief limiting factor in the production of war supplies no longer was facility capacity but materials and manpower. The search for maximum war production now required, not an encourage-

ment of facility expansion, but a curbing of it. On May 12, 1943 the War Production Board publicly announced:

With the exception of certain special programs, some special machinery, and further expansion of raw materials production, the United States at last has the machine tools and the capital equipment it needs to build pro- [fol. 21] duction to defeat the Axis. For the first time in its history, the nation now has a physical plant adequate to make the maximum use of its resources in men, skill and materials.

An examination of our production effort up to that point revealed that the nation had devoted almost as much effort to the construction of necessary facilities as it had to the actual production of arms and munitions. Thereafter, it was believed, the greater part of the plants and materials which had been used so far in making machinery and equipment ought to be devoted directly to manufacturing planes, guns, tanks, and other munitions. It was suggested, therefore, that steps be taken either to restrict certification very rigidly, or to terminate it entirely.

10. We were entering into a phase of total warfare under which materials and manpower were short and every facet of our economy was being affected. It would seem that no investment of capital should be made and no one should be allowed to use materials unless the facilities involved were clearly "necessary in the interest of national defense". If mass certifications were granted, the resultant loss of revenue to the Treasury would be appreciable. With increased tax rates, Necessity Certificates had become more attractive as a method of financing than they were when the statute was originally enacted. The cost to the Government of certified facilities was higher through a sacrifice in tax revenues. For these reasons, among others, the entire matter was re-examined with a view to determining whether the Act should be terminated so far as giving further amortization rights to any facilities or whether any investment of private capital should be entitled to emergency amortization.

11. On June 25, 1943, the matter was submitted to the Office of War Mobilization, with a suggestion of

[fol. 22] possible alternatives. The Director of War Mobilization, after considering the matter, directed the War and Navy Departments to amend the regulations governing the issuance of necessity certificates. It was suggested that the issuance of certificates for facilities for a military or naval supply might still be authorized in exceptional and limited cases where the need had been determined before expansion.

12. Therefore, an amendment to the existing regulations was submitted to the President for approval. This amendment to the Regulations was approved by the President on October 5, 1943 (8 F. R. 13824). A copy is attached and marked Exhibit C. Out of fairness to the applicant who had already spent his money or who had previously filed his application, the discontinuance was not to apply retroactively.

The amendment provided that a facility "shall not be deemed necessary" unless either Secretary, in exceptional cases, has determined prior to the beginning of construction or the date of acquisition that there is a shortage of facilities for a supply required for military or naval use and that it is to the advantage of the Government that additional facilities for such supply be privately financed. As has been indicated, the clear intention was to obtain substantial termination of the issuance of certificates. For that reason, the press release issued on the date when the President approved the regulations stated that the amendment "indicates virtual termination of the tax amortization privilege". (See NY Times, Oct. 10, 1943, Sec. 5, P. 59, Col. 1; NY Times, Dec. 19 1943, Sec. 5, P. 10S, Col. 5)

13. In addition to the extensive notoriety of the amendment given in the press of the country and its publication [fol. 23] in the Federal Register, a copy of this amendment was sent to all taxpayers, including the plaintiff United States Graphite Company, who had previously filed application for necessity certificates. Copy of this notice is attached and marked Exhibit D.

14. On December 17, 1943, the President, by Executive Order, (No. 9406, 8 F. R. 16955) transferred the function of issuing necessity certificates in all future cases from

the Secretary of War and the Secretary of the Navy to the Chairman of the War Production Board. The War and Navy Departments, however, were to decide the applications then on file. The principle of predetermination and the principle of considering what was to the advantage of the Government as a financial matter were retained in the transfer. On the same date, the President approved the amended regulations governing the issuance of necessity certificates prescribed by the Chairman of the War Production Board. Copies of these regulations are attached hereto and marked Exhibit E.

15. The new regulations adopting the principles outlined in the regulations of the Secretaries of War and Navy recognized the complete tie-in between the actions taken in granting priorities or authorization to construct with respect to facilities and the financial matters to be decided with respect to the issuance of necessity certificates. Regulation (3)(c)(V) required that an application for necessity certificate be filed concurrently with the request for priority assistance or specific authorization.

16. With respect to future certifications, the Executive Order specified that necessity certificates should not be issued unless prior to the beginning of construction or date of acquisition, the Chairman of the War Production Board determined (1) that the facilities were clearly necessary [fol. 24] for the war effort, and (2) that it was to the advantage of the Government that the facilities be privately financed.

17. It should be noted in this connection that the granting of priorities called for different considerations and the application of different standards than those entering into the issuance of necessity certificates. The power to grant priorities was derived from an entirely separate law (The Second War Power Act) and was administered under different Executive Orders No. 9040 (7 F. R. 527); No. 9125 (7 F. R. 2719); No. 9638 (10 F. R. 12591). In point of fact, the preference ratings issued to United States Graphite Company in this case for this equipment were AA-3. There were several priorities higher than this that could have been granted.

18. There was a tremendous advantage to be gained by any private manufacturer who could build up a postwar plant at the expense of wartime income. A memorandum prepared by the Tax Amortization Branch of the War Production Board outlining the factors to be considered in predetermination, whether it was to the advantage of the Government that the facilities be privately financed, is attached and marked Exhibit F. The standards applied in the partial certification of facilities were these:

I. Postwar utility

A. Under War Production Board policy, facilities having presumptive postwar utility receive partial certification only. This policy arises out of section 3-b-2 of Executive Order 9406 which requires a finding: "that it is to the advantage of the Government that such additional facilities be privately financed." The section was designed to protect the financial interest of all of the [fol. 25] taxpayers in a certified facility. The Government, which represents all the taxpayers, may eventually pay as much as 85 per cent of the cost of a fully certified facility, whereas if the facility were Government owned, the Government would be able, by sale or other disposition after the war, to recoup a part of its cost. Thus, the facility would have been made available for the war effort at a probable saving as compared with full certification. The saving would result no matter who is able to use the facility after the war, so that postwar utility should not be considered as limited to utility in the hands of any particular applicant.

B. Postwar utility is not restricted to usefulness to the applicant himself in his regular business, as a facility is considered to have presumptive postwar utility if it may reasonably be considered useful to anyone after the war. For example, a "standard machine tool" is always considered to have postwar utility because it can be used to produce many items other than the subject war product for which the applicant needs it. On the other hand, a "special machine tool" which can be used only to make a specific war product having no civilian

use would be considered as having little or no presumptive postwar utility. Again, permanent structures, installations, and building additions are practically always to be considered as having presumptive postwar utility, while a strictly temporary structure of such construction that it could not be useful for many years might be considered to have little or no presumptive postwar utility.

II. Purpose of partial certification

Partial certification is intended to cover a liberal allowance for the excess cost of wartime acquisition or construction as compared with normal or prewar (1937-1939) costs.

[fol. 26] III. Standard 35 per cent partial certification

A. After surveys of current and prewar costs of many types of facilities, partial certification has been standardized at 35 per cent of current costs.

B. Departure from the standard 35 per cent partial certification for facilities having presumptive postwar utility would require definite evidence that 35 per cent does not cover the increase in current costs above prewar costs. For example, if it be established that a facility currently costing $100,000 could have been built in the period 1937-39 for $40,000, a recommendation of 60 per cent certification would be in order.

IV. Mixed percentage certification

There is no objection to recommending 100 per cent certification of certain facilities and denial or partial certification of certain other facilities covered by the same application, or a mixture of all three recommendations, as the facts may warrant. Such mixed percentage recommendations should clearly indicate which recommendation applies to each portion of the application, and the reasons therefor.

V. Recommendations

All recommendations should specify whether or not the facility is considered to have postwar utility. If special circumstances appear to warrant certification in excess

of the standard 35 per cent, the facts should be clearly stated to support an appropriate recommendation.

19. There is attached hereto a copy of the circular dated March 8, 1944 approved by J. A. Krug, then Vice Chairman of the War Production Board, setting forth criteria [fol. 27] for preparation of recommendations for necessity certificates. A copy is attached and marked Exhibit G.

20. Under the above established procedures, the application of the United States Graphite Company for a necessity certificate to amortize its machinery was considered. This application was filed on May 29, 1944 with the Tax Amortization Branch of the War Production Board. This application was considered independently of the issuance of a necessity certificate for the plant. The necessity for amortization of the machinery was determined upon the facts and circumstances then existing at the time of the application. The bulk of the machinery in question consisted of standard machine tools in general use in industry such as internal grinders, drill presses, surface grinders, hydraulic grinders, and related tools. It was our opinion that these items were likely to have a broad market and general value at the end of the war and be of use for normal peacetime production.

21. Applying the general principles and policies outlined in the regulations, we arrived at the determination that only 35 per cent of the cost of these items should be amortized during the emergency period. Accordingly, a necessity certificate was issued for the items acquired after the time of our determination, July 17, 1944, covering 35 per cent of the cost. Items acquired before that date were denied a necessity certificate for the reason that the application was not filed at the time required by the regulation.

22. The scope of this program is indicated by the fact that total dollar value of necessity certificates issued since the inception of the program in 1940 exceeds $6,700,000,000. Applications and certificates covered every phase of industry, manufacture, mining and transportation. Subse- [fol. 28] quent to the transfer of this program to the Chairman of the War Production Board on December 17, 1943, a total of 11,435 applications for necessity cer-

tificates were received and passed on by the War Production Board. Of these, 2,074 were approved, 4,268 were denied in part, 3,671 were denied in total and 1,422 were withdrawn. In approximate dollar value, the total amount covered by applications for necessity certificates during this period was $1,498,730,000. Of time amount, $70,-163,000 were approved and the total amount denied was $797,567,000.

23. Although accurate statistics are not available covering the exact percentages of such applications which were denied for various reasons, of the total amount of all certificates issued, a majority were granted for only a percentage of the amount applied for, varying in individual cases from 20 per cent to 80 per cent dependent upon the determination of what portion of the material applied for were attributable to expenditures necessary in the interests of national defense during the emergency period. A substantial portion of the applications were denied, in whole or in part, for the reasons that application was not made in a timely manner as provided by Executive Order No. 9406 of December 17, 1943 and the regulations of the War Production Board.

24. The administration of Section 124 involved difficult and intricate problems. As put by Under Secretary of War Patterson:

Danger came from two directions. On one side, the law had to be administered so as to make it possible for the manufacturer actually to secure the protection it was designed to provide and to secure it so promptly that he would begin work at once. On the other hand, the Government had to be protected against any action [fol. 29] under the law which might confer upon firms using it, advantages beyond those legitimate and necessary to the enlisting of their cooperation in building defense facilities. Under the special circumstances which existed between the fall of France and Pearl Harbor, a belief that the Tax Amortization Law was being used as a means to gain undeserved profits might have reacted disastrously upon the whole defense program.

25. The whole philosophy of the program was an attempt "to map a careful course which would secure haste

without waste". The determination of the application of the United States Graphite Company conformed to these principles.
Attachments.

Sidney T. Thomas.

Sworn and subscribed before me this 27th day of December, 1946.

Mary M. Repetti, Notary Public.

My commission expires Dec. 1, 1949.

[fol. 30] EXHIBIT A TO EXHIBIT 6-E—Filed Dec. 30, 1946

C. A. 36695

War Department

Office of the Under Secretary

Washington, D. C.

A Report to the Secretary of War on the Administration of Section 124 of the Internal Revenue Law Relating to the Issue of Necessity Certificates.

Introduction

Wars are often lost before the first shot is fired.

Fortunately enough Americans realized this back in 1940. Although the national peril was great, we were not at war. We were witnessing the tragic consequences of "too little and too late." Our Army was woefully small, and we were totally lacking in facilities capable of producing the vast quantities of munitions that would be required. Immediate action was needed to avert the fate of other unprepared nations.

Congress passed laws to get the men it knew we would need for our armed forces and to get the material with which to arm them. The Selective Training and Service Act was passed in September 1940 to get the men. The

Tax Amortization law was passed in October 1940 to help get the material.

Private industry was naturally reluctant to risk its funds in the creation of war facilities. The Tax Amortization law was designed by Congress to give industry protection against possible bankruptcy and to encourage it to use its capital in building war facilities. The [fol. 31] law did this by allowing a write-off of the cost of the facilities within a period of five years.

This measure enabled us as a Nation to rely upon private industry for part of the needed expansion. It gave us the opportunity to build with speed the necessary facilities, not only to defend our shores but to attack the enemy without let-up.

The attached report shows how the law, by no means perfect as it was first written, was amended to become more efficient step by step. It shows how the problems of administering it, unexpected in their extent and complexity, were tackled and solved. It outlines a few of these problems.

The need for huge quantities of tanks, planes and guns was evident at the start. But for tanks, we needed steel; for steel, we needed coke; for coke, we needed coal; for coal we needed transportation. New facilities were needed to produce an enormous variety of items needed for the war ranging from alpha protein to fish oils, from igloos to synthetic rubber, from V-mail to yeast. The total of facilities certified by the War Department had a value of almost five billion dollars.

Certification had to be speedy, but it also had to be carefully administered so that the Government's interest would be protected. Infinite care and careful attention to details were essential in meeting the many unprecedented situations which arose. The distinction between facilities necessary for defense purposes and those which were not, was often difficult to make. There was no doubt that a machine gun plant ought to be certified, and relatively little doubt that movie theatres and facilities for providing soft drinks, candies and pies for war workers ought not to be certified. But there were cases in between these extremes, such as facilities for housing,

[fol. 32] for banks and for servicing firms, where a correct decision as to the applicability of the law involved perplexities. Mistakes were doubtless made, but an important job was well done.

A pattern has here been written of how legislation designed to solve a technical and difficult problem can be put into action—perfected as it goes along—and, through intelligent administration, made to achieve notable success.

It is one chapter in the record of how this Nation, operating within a system of private enterprise which our enemies sneered at as stupid and inefficient, was able to arm itself with greater speed and thoroughness than any other Nation in history.

Robert P. Patterson, Under Secretary of War.

War Department

Office of the Under Secretary

Washington, D. C.

February 15, 1945

A Report to the Secretary of War on the Administration of Section 124 of the Internal Revenue Law Relating to the Issue of Necessity Certificates.

The Need for the Amortization Law

At the beginning of our rearmament program in 1940, industry was hesitant to accept contracts whose completion would require the use of private capital for creation of new facilities. Since we were not at war, and the future of the defense program hinged upon events and policies which could not be predicted with any certainty, [fol. 33] industry could not ignore the possibility that conversions and expansions undertaken for defense purposes might not be kept in operation long enough to repay their cost, if the usual rate of amortization was employed. The hesitancy which this provoked was in-

creased by two other factors, (1) the stringency with which the existing revenue laws treated facility costs in computing income, and (2) the prospect of greatly increased rates of taxation. Not only were these rates likely to increase, but no one could say exactly when or by how much.

In the light of these uncertainties, the hesitancy of industry was understandable. At the same time, speedy plant expansion and conversion were vital military necessities. Something had to be done to reconcile financial prudence with urgent military need. To bring this about some assurance was needed that, in computing income, special allowance would be made for the possibility that war facilities would become useless before the expiration of their normal life. In view of the probability that earnings would be high for a brief period, and then might drop, it seemed only fair to permit the cost of the facilities to be taken out of the high income during the period in which it was being earned.

In addition to the difficulties already mentioned, prospective contractors also had to take into account the existence of a tax law designed to limit profits. This was the Vinson-Trammel Act which had originally limited profits on naval and aircraft construction to 12%, but which was amended, at exactly the moment when a great facilities expansion became necessary, to limit profits to 8%. In addition, there was every indication that Congress would provide a very high excess profits tax to cover the period of maximum earnings. This tax policy threatened to prevent a company accumulating enough [fol. 34] surplus to absorb the portion of the cost of the facilities which remained unabsorbed at the cessation of war production. Even patriotism could not reasonably be expected to induce a contractor to court bankruptcy by tying up a large portion of his capital, much of it borrowed, in factory expansion which might suddenly become valuless. Some means had to be devised to allow the return to [of?] the cost of their expansion to the contractor while the expanded facilities were being used in war production.

The Treasury took the position that, under existing law, the depreciation period could not be accelerated.

It could give no assurance of a deduction for partial loss of useful value which, as soon as the emergency was over, would have allowed the writing down of the facilities to their post-war value. This inability to offer the contractor any assurance of special treatment of his war facilities for tax purposes made industry hesitate seriously about executing contracts for rearmament. The defense program was thus placed in serious jeopardy.

On May 26, 1940, the President called upon private industry for help in rearmament and recognized that, in view of a possible curtailment of orders within a year or two, private industry could not be expected to assume all the financial risks of this expansion. In a report of the Committee on Ways and Means of the House of Representatives on June 10, 1940 (Report No. 2491) made in connection with a revenue bill then under consideration, it was stated that proposals had been made to provide special amortization for national defense industries and to impose excess profits tax. The two proposals were to be considered as interdependent. A press release from the White House on July 10, 1940 announced that it had been decided to incorporate in the excess profits tax bill, [fol. 35] which was soon to be introduced, a provision for amortization over a five-year period of new facilities certified as necessary for the purpose of national defense. The announcement stated:

The contemplated action is expected not only to simplify the multiple tax problems of prospective contractors but to greatly clarify their future tax liabilities.

In this manner any doubts as to the tax position of contractors in the general program of national rearmament will be removed and they will be able quickly to execute defense contracts.

Legislative History—The Basic Law

World War I Law. There had been an amortization law for World War I but it was not considered a useful model. It had not been passed until three months after the Armistice; it provided for amortization on the basis of loss of useful value, an intangible factor which was to be determined by the courts. Consequently litigation had dragged on for years.

Basis for new law. In order to provide a law susceptible of exact calculation, it was decided that the new amortization provision should be based upon depreciation rather than loss of useful value. In other words, deduction of the entire cost of new defense plants was to be permitted during the period in which orders for war material continued. Because it was recognized that it was nearly impossible to determine in advance what facilities would be useful, and how far they would be useful, when war orders ceased, it was decided to permit the charging off of the entire cost, or a predetermined percentage thereof. Because it was also impossible to know in advance how long the facilities would be engaged on war [fol. 36] work, the tentative amortization period was fixed at five years, with provision for shortening the period and accelerating amortization correspondingly, with proper readjustment of the tax, if war orders did not require the use of the facilities for the full period of five years.

In order to provide a law susceptible of speedy administration, it was concluded that decisions as to necessity should be made not by the courts but by the procuring agencies, which could be expected to know best whether a particular expansion was necessary to national defense.

Introduction of bill. Provisions for amortization were incorporated in the bill, H.R. 10413, together with provisions for imposing an excess profits tax and for suspending the profit-limiting provisions of the Vinson-Trammel Act during the period in which the excess profits tax was in effect.

The Assistant Secretary of the Treasury, in explaining the bill, stated that the existing provisions for depreciation were designed to allow the cost of facilities as deductions from income during the years in which the asset contributed to income, but he recognized the inadequacy of these existing provisions when applied to facilities for the defense program.

Following the joint hearings of the Ways and Means Committee and the Senate Finance Committee, which consumed five days, H.R. 10413 was introduced in the House on August 27, 1940 and was passed without amendment on August 29.

Conditions in granting of amortization—Subsection (1). Objection was raised in the Senate to three subsections of the amortization provisions of the bill passed by the House. These subsections, (l), (j), and (k) incorporated [fol. 37] a policy designed to insure the continued existence of the amortized facilities for possible further use in national defense. To provide for this it was stipulated, under penalty of an increased tax liability, that the facilities for which amortization deductions were taken were not to be destroyed or substantially altered without the consent in writing of the Secretary of War or the Secretary of the Navy. If consent was refused the Government was obligated to purchase the facilities at a price not in excess of the adjusted base nor less than one dollar, with provision for repurchase by the taxpayer under certain circumstances.

The Advisory Commission to the Council of National Defense asked for the elimination of these three subsections. The Commission expressed full approval of their purpose but believed the objective could best be accomplished through contract provisions. In this connection the Advisory Commission outlined a contracting policy which it believed would adequately protect the interest of the Government in facilities which were accorded amortization.

The Finance Committee, after concluding its hearings, reported the bill back to the Senate with amendments. The principal amendment was a substitute subsection (i) to take the place of subsections (i), (j), and (k). The new subsection (i) required, in the alternative, either "non-reimbursement" or "government protection" as a condition to amortization. The Senate passed the bill as thus modified, and in conference the substitute subsection (i) was agreed upon.

Certificates Contemplated by Act. The Act, was finally approved on October 8, 1940 (Public Law 801, 76th Congress; Section 124 Internal Revenue Code) provided as follows:

[fol. 38] Necessity Certificate. For facilities acquired

or constructed after June 10, 1940*, which the Advisory Commission and either the Secretary of War or the Secretary of the Navy by the issuance of a "Necessity Certificate" certified were necessary in the interest of national defense, an annual deduction of 20% of the cost could be taken at the election of the taxpayer. Thus, these facilities could be amortized in five years.

Certificates of Non-Reimbursement and Government Protection: By the terms of subsection (i), the amortization deduction was allowed only upon condition that the contract offered no direct or indirect reimbursement in excess of normal exhaustion, wear and tear, unless the contract which afforded such reimbursement also contained terms which adequately protected the interest of the United States Government in the future use and disposition of the facility. The fact that no reimbursement had been offered in a particular contract could be established, with respect to any given contract, by a Certificate of Non-Reimbursement issued jointly by the Advisory Commission and either the War or Navy Departments. The fact that the contract adequately protected the interests of the government could be established by a Certificate of Government Protection, similarly issued.

Non-Necessity Certificate. If before the expiration of the five-year period the Secretary of War or the Secretary of the Navy certified by issuance of a "Non-Necessity Certificate" that particular facilities had ceased to be nec- [fol. 39] essary, provision was made, at the taxpayer's option, to recompute the amortization deduction so as to provide full amortization over the shortened period. A similar privilege was given, without issuance of a certificate, to all owners of certified facilities if the Pres-

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* This date was agreed upon in conference, it being the date upon which the House Ways and Means Committee reported its intention to consider an amortization Act. It was thought that a decision to build or acquire facilities after that date might be assumed to have been made with a promise of amortization. The original draft had fixed upon the date of the White House release, July 10, 1940.

ident proclaimed that a substantial portion of the certified facilities had ceased to be necessary. Taxes were to be recomputed in accordance with the recomputed amortization.

Payment Certificate. The Act also provided for certification by the Secretary of War or the Secretary of the Navy of the fact of payment in cases where a payment was made for unamortized costs because the contract involving the use of the facilities had been terminated by its terms or by cancellation, or in cases where a contemplated contract involving the use of the facilities was not granted. In such cases amortization was to be accelerated, at the election of the taxpayer, by permitting a larger deduction for the year of the payment.

Amendments of the Law

Filing Date. As passed on October 8, 1940, the amortization law provided that Necessity Certificates should not be issued unless issued before the beginning of the construction or the date of acquisition; except that in the case of facilities already started or acquired when the law was passed, the certificate had to be issued before February 6, 1941. This time limit for the issuance of a certificate, regardless of the time of filing the application, afforded no opportunity for investigation and made the statute impossible to administer. As the February 6 deadline approached, the necessity for legislative change became obvious. The matter was laid before Congress, and on January 31, 1941, Public Law No. 3, 77th Congress, (H.J.Res. 80) was passed amending the law so [fol. 40] as to eliminate the fixed date and provide instead that an application for a necessity certificate must be filed within 60 days of the beginning of construction or of the date of acquisition or before February 6, 1941.

Although this provided ample time for the proper consideration of cases, it was found by late spring that the continually growing demand for war material caused such frequent changes in plans for facilities that the time limit of 60 days for the filing of applications was unsatisfactory. The War and Navy Departments accordingly

proposed to Congress on July 30, 1941 that the law be amended to extend to six months the period in which applications must be filed. This, it was hoped, would make it possible to gather in one application proposals which had previously appeared in two or more. The amendment, together with others described below were passed by Congress. The President gave his approval to it as Public Law 285, 77th Congress (H.J.Res 235) on October 30, 1941.

Joint Certification. The requirement of joint certification by two governmental authorities had all the disadvantages of divided responsibility. Administrative history in the past had often proved the unwisdom of such an arrangement; experience with the Amortization Law proved it once more. While the War and Navy Departments had agreed with the Advisory Commission of the Council of National Defense on instructions for the preparation of applications early in November of 1940, agreement on general principles for deciding cases was not achieved. Particular difficulty was encountered with respect to Certificates of Non-Reimbursement and Government Protection. Every attempt was made on both sides to be judicial, but agreement was not achieved. Since there was no machinery for appeal, deadlocks were inevitable and delays in administration became sufficiently [fol. 41-42] serious to give contractors just cause for concern. A change in the law was necessary. The Armed Services urged that they be relieved of responsibility or given sole responsibility. By the fall of 1941, the Advisory Commission had practically no active functions other than that of certifying orders under the Amortization Law. The Armed Services, being the procuring agencies, were in the best position to decide the facility needs of their procurement programs. Once convinced that joint certification was a failure, Congress had little hesitation in terminating the Advisory Commission's certifying authority. This was done on October 30, 1941. From then on, War Department cases were decided by the War Department alone and Navy cases decided by the Navy alone. In due course of time, both agencies came to lean

heavily upon the able assistance of the War Production Board in matters involving civilian supply.

Non-Reimbursement and Government Protection. Because sub-section (i) of the basic law required certification that there had been no reimbursement or in the alternative that there had been government protection; every contract, even those for small amounts of standard supplies, had to be examined. In the absence of either a Certificate of Non-Reimbursement or a Certificate of Government Protection, no assurance could be given the contractor that he would be entitled to amortization under his Necessity Certificate.

Determination of whether or not the price included reimbursement for more than normal depreciation proved almost impossible of attainment.

It was also difficult to establish standards for protection of the government's interest in amortizable facilities. An attempt was made to arrive at a uniform contract pro- [fol. 43] vision to be inserted in all supply contracts involving additional facilities, which would adequately protect the interest of the United States in the future use of disposition of the facilities and would legally warrant the issuance of a Certificate of Government Protection. However, the Attorney General gave his approval only to provisions which proved unworkable from a practical standpoint.

Some relief was secured by the October 30, 1941 amendment to the law (Public Law 285) whereby contracts under $15,000 and contracts for non-defense supplies were excluded from examination for reimbursement of facility costs. But there still remained the apparently insuperable difficulty of deciding whether the unit price in the numerous larger contracts included an amount in excess of normal depreciation. The amortization law was intended to overcome the hesitancy of contractors to invest private funds in needed facilities. To do this effectively the necessary certificates had to be issued at approximately the time of contracting for the facilities. By the end of 1941 Necessity Certificates had been issued by the War Department on $1,210,700,000 of facilities but the record on Certificates on Non-Reimbursement and on

Government Protection was unsatisfactory. 13,120 applications had been made to the War Department for certificates of Non-Reimbursement, only 278 had been issued. 219 applications had been received for Certificate of Government Protection; only 30 had been issued. Delay was causing considerable doubt about the amortization allowance. Hesitancy on the part of prospective contractors continued.

This was the situation when the United States was attacked by Japan. In spite of the gathering danger, the flow of private capital into plant expansions had not been rapid. And although a vast amount of Government financing had been provided, the tremendous [fol. 44] demands which the coming war set up made it highly desirable to afford private capital an adequate opportunity to serve.

On December 17, 1941, the War and Navy Departments proposed to Congress the repeal of subsection (i) as of the date of its passage. They took the position that the protection of the interest of the Government could be assured by a sound contracting policy at the time the contract was agreed upon. By that time the War Department had gained a great deal of experience with the problems involved in contracting for supplies requiring new or additional facilities. In view of the grave situation created by the outbreak of war, and the urgent need for making the greatest practicable use of private financing, it seemed only reasonable to rely upon this experience, rather than rigid rules, in administering the Amortization Act.

On February 5, 1942, H. J. Res. 257 (Public Law 436) which repealed subsection (i) as of the date of its passage was approved. With its passage the major obstacle in administering the Amortization Act was removed.

Further Amendments.

Under the original act only corporations were allowed amortization deductions. Although never clearly stated, it was understood that this limitation sprang from the fact that only corporations were liable to the excess profits tax. From time to time the question was raised whether individuals or partnerships, operating as such ought not to be included. As a consequence, in the Revenue Act of

1942, the Treasury Department suggested the extension of amortization to individuals and partnerships and the law was so amended by Public Law No. 753, 79th Congress. This same Act also permitted, for the first time, amortiza-
[fol. 45] tion of facilities acquired prior to June 10, 1940, the earliest permissible date of acquisition being extended back to January 1, 1940. The War Department neither offered nor expressly favored these amendments.

Administration By The War Department

Delegation to Under Secretary. On October 15, 1940, one week after the passage of the Amortization Law, the Secretary of War delegated to the then Assistant Secretary of War (later Under Secretary of War) the duty of considering and acting upon the certificates which the Act required the Secretary of War to issue.

Organization of Tax Amortization Unit. A unit was established in the Office of the Assistant Secretary of War to administer the Act and to advise the Assistant Secretary as to the action to be taken upon applications. It was not formalized until Mr. Samuel Duryee became its Chief in December 1940. Lt. Colonel (now Brig. General) Edward S. Greenbaum took over as acting Chief in March 1941 and carried that responsibility along with his other duties until January 1942. Lt. Colonel (now Colonel) George H. Foster then became Chief and held that position until the work was completed in 1944. The entire staff including military and civilian personnel was never more than 80 persons at any one time. Although this unit with its personnel and records has been transferred to different Divisions of the War Department, it has continued since since its inception to administer the law under, and has remained responsible to the Under Secretary. All policy matters were settled in consultation with him and each certificate granted or denied received his approval.

Appointment of Advisory Board. In April, 1941, the Un-
[fol. 46] der Secretary appointed an advisory board, composed of men prominent in civil life, to examine applications for amortization with particular reference to the issuance of Certificates of Non-Reimbursement. These men gave generously of their time and experience and

greatly aided the War Department in its effort to solve these difficult problems. The Board was composed of:

James P. Baxter, 3rd, President, Williams College, Massachusetts
Samuel S. Duryee, Attorney, New York City
W. Tudor Gardiner, Former Governor of Maine
Garrard Glenn, Professor of Law, University of Virginia
James Hall, C. P. A., New York City
F. H. Hurdman, C. P. A., New York City
Bernard Knollenberg, Librarian, Yale University, Connecticut
James M. Landis, Dean, Harvard Law School
Harold F. Linder, Retired, New York City
William L. Marbury, Lawyer, Baltimore, Maryland
Abbot P. Mills, Attorney, Washington, D. C.
Dave H. Morris, Jr., Banker, New York City
Charles H. Murchison, Attorney, Jacksonville, Florida
George S. Olive, C. P. A., Indianapolis, Indiana
Frederick F. Umhey, Executive Secretary International Ladies Garment Workers Union, New York City

(David Dubinsky, President of the International Ladies [fol. 47] Garment Workers Union, was originally appointed, but at his request Mr. Umhey was appointed in his place.)

With the repeal of the non-reimbursement and government protection provisions of the law, the principal duties of the Board ceased. However, the aid of individual members was from time to time obtained in deciding the more difficult questions relating to necessity certificate applications. In the Spring of 1942, a working committee of three was formed, composed of Mr. Hall, Mr. Umhey and Professor Glenn (who was later forced to withdraw because of ill health). They made regular trips to Washington in order to advise on policies or specific cases and preside over hearings with applicants. Their work was of material assistance to the War Department.

Regulations. War Department interpretation of the law was based upon Regulations governing the issuance of Necessity Certificates, drawn up by a three-man Com-

mittee consisting of representatives of the War Department, Navy and War Production Board, and approved by the President May 22, 1942.

The regulations set no hard and fast rules except as to purely procedural matters such as timeliness of filing. The guides to be followed in determining necessity were quite simple and can be briefly summarized as follows. The necessity of a facility was to be determined in accordance with whether the supply it produced was required in the interest of national defense. A supply might be so required if essential to the armed forces, to any foreign nation furnished supplies under an act of Congress, or, under certain circumstances, even if it had only civilian use. Shortage of capacity in the industry must ordinarily be shown in order to justify an expansion. [fol. 48] Shortage of Capacity. The basic reason for insisting on a showing of shortage of capacity, rather than to increase the capacity of a particular company to meet its contract requirements, was the desire to spread contracts more evenly among all portions of an industry capable of producing the required items. Although generally successful in helping to spread the work, this policy necessarily required the denial of applications in cases where other companies possessed idle facilities capable of producing the needed items. When, at a later date, war production had to be doubled and trebled, the resulting shortage in capacity compelled the reconsideration of these original denials.

Types of Supplies. In the beginning it was evident that tanks, planes, guns, and ships would be demanded in quantities far beyond the existing fabricating capacity of the country. Shortly it became apparent that additional basic steel capacity was necessary. This in turn required more coke ovens for coke, more coal for coke, more iron ore, hence more mining facilities, and more transportation facilities to move the ore, coal, coke, and steel to places of usefulness. Workmen had to be transported to and from work, or housed at places of employment. Applications for the certification of transportation facilities and war housing were presented for decision. At many plants the rapid expansion of personnel led to the in-

auguration of "in-plant feeding." This brought applications for cafeteria facilities in the plants. A few of the items which were at one time or another determined to be necessary on the particular facts of the case, picked entirely at random, may be listed to give some idea of their great variety:

alpha protein, aircraft antenna, anti-toxins, arsenicals, balloon barrage wiring, balloon cloth, blitz cans, box shook, [fol. 49] commercial alcohol, cotton duck, cord, cuspidors, dehydrated foods, dyes, ether, felt, fire extinguishers, fish oils, glue, gun butts, gun stocks, hard chrome plating, igloos, insulation materials, jeans, jungle boots, lenses, life preservers, lime, nicotinic acid, parachutes, paulins, pliers, plywood, pigments, ponderosa pine, poplins, prisms, remote control systems, resin coated raincoats, safety belts, shearlings, slide rules, soluble coffee, steel casings, steel tubing, sulpha drugs, surgical dressings, synthetic rubber, synthetic sapphire, tallow, tin plating, tuads, V-mail, water purification machines, webbing, wire cutters, wrenches, and yeast.

Other Factors. In addition to the specific legal and administrative problems governing amortization, it was necessary to take into account broad problems of contract distribution, priorities, price control, and many other factors affecting the transfer from a peace to a war economy. In determining the need for facilities it was necessary, not only to consider contract commitments and future demands related thereto, but to place the request for certification in its proper place in the over-all picture of expansion, priorities, contract distribution, and other problems and policies. When a decision on a particular case was finally made, it represented an investigation of the industrial consequences which might spring from it. As the country approached an all-out war effort it became more and more difficult to decide where to draw the line. Although some general trends of procedure might be traced, the policy was predominantly one of judging each case on its merits.

Relation to National Defense. Certain facilities were obviously too far removed from the war to be certifiable. New construction of an office building in a large

city was denied even though there was indication that its construction would ultimately be of indirect bene- [fol. 50] fit to the defense program. And even though the Office of the Petroleum Co-ordinator requested wholesale conversion of oil burners to coal burners, such conversion was not certified where the applicant's product was not necessary. Applications related to such services as engineering were denied (the product of engineering firms being denominated as intellectual rather than physical) as were those related to retail distribution.

Time of Expansion. The decision as to necessity was made as of the time of expansion or later certification. In some cases the application was not received until after the facility was no longer necessary. Certain expansions of the natural rubber fabricating industry, of tin fabrication and of toluene processing (to use South American oil) were started and thereafter proved ineffective due to the situation arising after Pearl Harbor. However, amortization was granted because the facilities had been necessary when constructed.

Items Unnecessary for Defense Purposes. On occasion, an applicant was allowed certification of a larger facility than it actually needed if there was convincing evidence that no smaller facility was available. A company purchased "the only location we could get" which was "probably a third more than our requirements." Certification was granted on evidence that the useful part of the land was necessary and none other available. But where shortage of building space resulted from the fact that the applicant was building for permanence with comparative luxury, certification of a new building was denied. For the War Department was careful not to certify facilities which were in the luxury class. Plants to produce soft drinks and pies in this country were denied, as were bottled drink and [fol. 51] candy trucks and vending machines. Certification was denied for electric signs, glass desk tops, fish ponds, ping pong tables, pool tables and soda fountains. A flag pole was considered certifiable. Expensive carpets were denied. (But where the applicant's business involved use of diamonds, often dropped on the floor, a carpet was certified.) Air conditioning was ordinarily

denied as a luxury; certified where necessary for precision work or for other extraordinary reasons. While facilities for employees were in general allowed, the expansion of a bank to accommodate defense workers and soldiers was denied, as was a shopping unit to be built in connection with a housing project consisting of a restaurant, recreation building, doctors' and dentists' offices, movie theatre, drug store, etc. Couches were on occasion denied, yet where a shift was made from male to female labor and heat prostration was a frequent occurrence in a plant, they were obviously necessary and they were certified.

Costs: Derivation of Funds: Reconversion. The cost of a facility was in general considered a matter in the discretion of the applicant so that if the facility was appropriate and necessary, inquiry was not made as to whether it was purchased or constructed for the lowest possible price or cheapest type of construction. Nor was inquiry made of the source of the funds from which the purchase was made. A new plant was about to be constructed following condemnation of an older plant; presumably it was financed with funds received from the condemnation; the application was certified. The cost of conversion from peacetime to war use was certified, but no certificate granted for an allowance in order to reconvert to peacetime use after the war.

Acquisition of Leased Property. Many applications were received for purchase of formerly leased property. In these cases, careful inquiry was made as to [fol. 52] whether the purchase was actually necessary or whether it was feasible for the applicant to continue to lease; if the latter was the case, certification was refused.

Acquisition from Related Persons. Purchase of facilities from related persons were not ordinarily certified. Applications were denied involving purchase of land from the president of the applicant corporation or from his father, or from companies having substantial interlocking stock interests. However, the cost of transporting facilities from the plant of one related person to another was certified.

Second-hand Facilities. Care was also taken in screening applications for purchases of second-hand facilities.

Used freight cars sold by one railroad to another were on occasion denied as were purchases of used locomotives, ships and barges. Such transfers did nothing to increase over-all transportation facilities. On the other hand, where barges were bought second-hand for $59,000, the cost of reconditioning was $400,000 and the barges had been idle for a year due to the completion of a bridge which rendered unnecessary their former use as ferries, the purchase price and reconditioning cost were certified. A similar rule was applied to already existing plants or buildings, although in such cases it was ordinarily easier to prove the transfer was necessary. Thus, while acquisition of an existing grain storage elevator was denied certification, the acquisition of a textile factory which was going to be junked, was certified. Purchase of a brewery to be used for dried egg production (urgently required by Lend-Lease) was certified: such conversions from normal use to war use were, indeed common—from production of permanent waving machines to aircraft instruments, from soda fountain equipment to machine guns, from pants press-[fol. 53] ing to 20 mm. shot, from coffins to shells. With second-hand equipment such as tools, or materials, it was not ordinarily feasible to inquire as to previous use, and certification was made where the acquisition was necessary. Inquiry, in fact, had revealed on occasion a decided increase in usefulness; an example was use by an ordnance manufacturer of steel acquired from a World's Fair Building.

Defense Plant Corporation Facilities. The Defense Plant Corporation had been organized by the Reconstruction Finance Corporation to finance war facilities which were to be privately operated but government-owned (owned by the Defense Plant Corporation) and leased to the operator. In certain cases the operator desired to purchase the facility from the Defense Plant Corporation. Such acquisition would not have increased over-all productive capacity but it would have encouraged use of private capital in war industry. The conclusion was reached that, in general, acquisitions from the Defense Plant Corporation were not within the scope of the Amortization Law and applications for their certification were denied.

Motive. The applicant's motive in making the expansion was not inquired into. A tramway installed in a coal mine was certified on evidence that it increased production despite an indication that the applicant's motive was to save money in disposing of waste material. Similarly, an addition to power plant facilities apparently made to save costs was certified on evidence that the addition saved fuel. The original use of the facility, however, was considered important. In an early case, a building had been erected to produce 70% peacetime products and 30% war products. A 30% certificate was granted. Later, the owner (without additional expense) converted the remaining 70% of its plant to war work and requested 100% certi-[fol. 54] fication. The request was denied. In a somewhat similar case, a plant was erected to produce an unnecessary product (91 octane gasoline) in 1940. Two years later, the applicant erected additional facilities which, when combined with the 1940 facilities would produce a necessary product (100 octane gasoline). Certification was limited to the 1942 facilities. In yet another case, the applicant started to build a factory for production of electric sirens. Before construction was completed, the applicant was advised that electric sirens were not necessary. It accordingly completed its building to produce certain Ordnance supplies (which were necessary). The entire construction was certified.

Efforts to Limit Amortization

By the spring of 1943 it was becoming apparent that the chief limiting factor in the production of war supplies no longer was facility capacity but materials and manpower. The use of steel and manpower to create factories, which could not then be fully used because of a lack of materials and workers, would do injury to the war effort. The search for maximum war production now required, not an encouragement of facility expansion, but a curbing of it. On May 12, 1943 the War Production Board publicly announced:

With the exception of certain special programs, some special machinery, and further expansion of raw materials production, the United States at last has the machine tools

and the capital equipment it needs to build production to defeat the Axis. For the first time in its history, the nation now has a physical plant adequate to make the maximum use of its resources in men, skill and materials.

An examination of our production effort up to that point revealed that the nation had devoted almost as [fol. 55] much effort to the construction of necessary facilities as it had to the actual production of arms and munitions. Thereafter, it was believed, the greater part of the plants and materials which had been used so far in making machinery and equipment ought to be devoted directly to manufacturing planes, guns, tanks, and other munitions. It was suggested, therefore, that steps be taken either to restrict certification very rigidly, or to terminate it entirely.

Another factor also suggested the need for a reconsideration of the amortization problem. The broad language of the act did not limit amortization to facilities for producing supplies for direct military or naval use. An increasing number of applications came in for certification of facilities in fields not under the control of the War and Navy Departments. Facilities needed in connection with transportation, the processing of food, and the production of raw materials were all deemed necessary by the agencies charged with coordinating these activities. During the period when facilities for direct military and naval supplies constituted the bulk of the expansion program, and other facilities were of minor significance, certification of cases of the latter type had been made by the War and Navy Departments upon the recommendation of the other agencies. However, in view of the fact that the War and Navy Departments were usually not directly conversant with the needs of the particular cases, it was thought that, if these cases were going to increase, certification ought to be by some other agency better able to judge their merits.

On June 25, 1943 the matter was submitted to the Office of War Mobilization, with a suggestion of possible alternatives. The Director of War Mobilization, after considering the matter, directed the War and Navy Departments [fol. 56] to amend the regulations governing the issuance of Necessity Certificates so as to provide that certification

should be discontinued. He did suggest, however, that the issuance of certificates for facilities for a military or naval supply might still be authorized in exceptional and limited cases where the need had been determined before expansion. A survey among the supply services of the War Department had revealed that in some programs further expansion was required.

Therefore, an amendment to the existing regulations was submitted to the President for approval. This provided that with the exception of facilities contracted for before the date of the amendment, no facility could be considered for certification unless the certificate was issued before the expansion started. It also provided that further certification under this restriction should be made only in cases of facilities for a supply for military or naval uses, and then only after consideration of the relative advantage of governmental financing as against private financing with amortization. Simultaneously, the technical services of the War Department were advised that, where additional facilities were required and were not available from Government-owned facilities, and the private companies which could provide them were unwilling to finance them without amortization, arrangements should be made for Government financing. A few cases, it was recognized, might still arise which ought to be handled by amortization, but they would be limited to exceptional situations.

The amendment was approved by the President on October 5, 1943. Subsequently, notwithstanding the amendment, the War Department was strongly urged to issue certificates for facilities for purposes not directly military but nevertheless claimed to be essential to national defense. [fol. 57] The Office of Defense Transportation, in particular, had urged that transportation facilities be expanded to relieve the tight situation created by increasingly heavy shipments to the West Coast. On November 1, 1943, the War Department called this situation to the attention of the Office of War Mobilization with the suggestion that if certification was to be made in such cases, it should be done by the War Production Board. Thus, the question of amortization could be settled by the same agency which authorized the use of materials for the contemplated expansion. On December 17, 1943, the President, by Executive

Order, transferred the function of issuing Necessity Certificates in all future cases from the Secretary of War and the Secretary of the Navy to the Chairman of the War Production Board. The War and Navy Departments, however, were to decide the applications then on file.

Non-Necessity and Payment Certificates. By Executive Order No. 9486 of September 30, 1944, the power and the responsibility of the War Department in the issuance of Non-Necessity Certificates was transferred to the Chairman of the War Production Board, to be exercised by him in connection with his responsibility for guiding reconversion from war to peace-time production. By Executive Order No. 9490 of October 20, 1944, all the remaining functions of the War Department in connection with certification under Section 124 were likewise transferred to the Chairman of the War Production Board. This latter order covered amendments of Necessity Certificates already issued and Payment Certificates under subsection (h). Since the War Department had never issued a Non-Necessity Certificate under subsection (d), and had issued only three Payment Certificates under subsection (h). Execu- [fol. 58] tive Order No. 9490 in effect transferred a function which had never been exercised.

Statistical Summary

In the period between the passage of the Tax Amortization Act and the transfer of the certification authority to the War Production Board, 31,047 applications for Necessity Certificates were filed for consideration by the War Department. From among that number the War Department issued 26,775 certificates covering the whole or part of the application. The remaining 4,272 cases were denied, withdrawn, or otherwise disposed of. The total dollar value of the facilities certified, on the basis of their estimated worth on the date of application, was $4,955,813,760.16.

A break-down of the figures is provided in the table which follows. It should be noted that the total in this table is three hundred million less than that cited above. The difference arises from the fact that the table is taken from the statistics compiled, first by the Advisory Commission,

and later by the statistical sections of the War Production Board after the Advisory Commission ceased to be a joint certifying authority in October 1941. In this compilation, after April 1943, all facilities of less than $25,000 in value in any one plant were excluded. The War Department figures includes them.

[fol. 59]

Type of Product	Estimated Cost	Percentage
Manufacturing		
Aircraft, Engines, Parts & Access.	$ 365,731,000	7.93
Ship Construction & Repair	12,234,000	0.27
Combat & Other Motorized Vehicles	100,547,000	2.18
Guns	95,846,000	2.08
Ammunition, Shells & Bombs	135,372,000	2.93
Explosives & Ammunition Loading	13,025,000	0.28
Iron & Steel		
Basic	270,062,000	5.85
Fabricated	82,009,000	1.78
Nonferrous Metals & Their Products		
Aluminum & Magnesium	306,462,000	6.64
Other	56,265,000	1.22
Mach. Tools & Other Metal Work. Equip.	158,603,000	3.44
Machinery and Elec. Equip. & Appl.	213,273,000	4.62
Chemicals		
Synthetic Rubber	40,440,000	0.88
Other	288,405,000	6.25
Coal and Petroleum Products		
Aviation Gasoline	437,727,000	9.49
Other	100,863,000	2.19
Food Processing	35,373,000	0.77
Miscellaneous	319,777,000	6.93
TOTAL MANUFACTURING	$3,032,014,000	
Mining and Industrial Service		
Mining	82,318,000	1.78
Gas, Light, Heat and Power		
Electric Power Generation	123,837,000	2.68
Electric Power Transmission	109,032,000	2.36
Gas Manufacture and Transmission	48,499,000	1.05
Steam, Heat and Power	6,404,000	0.14
TOTAL MINING	$ 370,090,000	
Transportation and Related Service		
Rail	1,066,868,000	23.13
Pipe-line	17,654,000	0.38
Motor, Air and Water	84,489,000	1.83
Terminal Facilities	2,371,000	0.05
TOTAL TRANSPORTATION	$1,171,382,000	
Communication	6,419,000	0.14
Non-Industrial Service	32,931,000	0.71
GRAND TOTAL	$4,612,836,000	

After the transfer of the certification authority to the War Production Board, the War Department's action upon new applications was limited to making recommendations at the request of the War Production Board when it was claimed that the facilities were necessary for military supply. The fact that relatively few cases came up in which the need for additional privately financed facilities [fol. 60] for military supply was established confirmed the War Department in its belief that the need for amortization as an inducement to the private financing of such facilities had come practically to an end. The War Department disposed of its backlog of about five thousand applications filed prior to the transfer of the certification authority by July 19, 1944.

Conclusion

The history of the Tax Amortization Law, and of its administration by the War Department, are topics full of technical and difficult detail. Yet, behind these complexities, lay the stark necessities of national defense in one of the greatest emergencies of our history. We either had to build an unparalleled munitions industry within the space of a few months or face disaster. We had to do so within the framework of the system of private enterprise, not only because that was the system in which we believed, but also because it was the system we had, and any attempt to change it suddenly would have brought dangerous confusion and delay.

This could not be achieved, however, merely by broad declarations of principle. Appeals to patriotism alone could not relieve the individual manufacturer of the necessity for remaining solvent. He could be asked to undertake the rapid expansion which national defense required for an activity of uncertain duration, only if he were given reasonable protection against bankruptcy at the end of the effort. The Tax Amortization Law was designed to provide that protection.

But the mere passage of the law did not remove the difficulty. Under any circumstances difficult problems of administering it would have arisen, problems which, unless solved, could largely destroy its intended effect.

Danger came from two directions. On one side, the law had to be administered so as to make it possible for the [fol. 61] manufacturer actually to secure the protection it was designed to provide and to secure it so promptly that he would begin work at once. On the other hand, the Government had to be protected against any action under the law which might confer upon firms using it advantages beyond those legitimate and necessary to the enlisting of the cooperation in building defense facilities. Under the special circumstances which existed between the fall of France and Pearl Harbor, a belief that the Tax Amortization Law was being used as a means to gain undeserved profits might have reacted disastrously upon the whole defense program.

The problem of the administration of the law was, therefore, an unusually thorny one. It was necessary to map a careful course which would secure haste without waste. Little help could be gained from precedent of past experience. Many difficulties were encountered. Not all of them were solved satisfactorily; perhaps some of them never could have been. Nevertheless, we got the plants, which in turn produced the guns, tanks, and planes. It is a reasonable conclusion that, without the Tax Amortization Law the construction of our munitions industry would have been seriously retarded. Had that occurred, our position today might have been very different from what it is.

Robert P. Paterson, Under Secretary of War.

Filed Dec. 30 1946

[fol. 62] Exhibit F to Exhibit 6-E

Filed Dec 30 1946

WAR PRODUCTION BOARD
WASHINGTON, D. C.

February 9, 1944

Memorandum

To: The Industry Divisions, War Production Board
Facilities and Inspection Branch,
Production Division, War Department
The Bureaus of the Navy Department
U. S. Maritime Commission
The Office of War Utilities
The Office of Defense Transportation
The Petroleum Administrator for War
War Foods Administration
Office of the Rubber Director

From: The Facilities Bureau

Deputy Director for Tax Amortization

Attached is a statement designed to be of aid in the preparation of recommendations. It is not intended to be all inclusive. Additional information may, from time to time be requested by members of the staff of the Tax Amortization Branch.

Carman G. Blough, Deputy Director for Tax Amortization Facilities Bureau

[fol. 63] Preparation of Recommendations for Tax Amortization

The Government's substantial monetary interest in facilities covered by a Necessity Certificate must be recognized. Amortization represents an abnormal tax deduction and hence a loss of revenue to the Government. In the case of companies in the higher tax brackets, this may amount to 81 percent of the cost of the facilities.

No facility will be certified unless the war effort would

actually be weakened by the lack thereof. This bears upon the degree of essentiality. The facility cannot be merely desirable, helpful or appropriate. It must be essential and must be required exclusively for production of one or more of the supplies enumerated in Section (3)(a) of the WPB Regulations governing the issuance of Necessity Certificates. An overall shortage of facilities in the industry or a situation covered by Section (3)(b)(ii) of the Regulations must be found to exist.

In determining whether it is to the advantage of the Government that the facilities be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market may be assumed to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, if a facility appears to be of such a type that it would have a reasonably wide market after the war, it may generally be assumed that, provided the DPC or other government agency is willing to purchase it, it would be to the ad- [fol. 64] vantage of the Government that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a percentage certificate were issued, such percentage being based, for example, on excess cost attributable to the war.

Reports must contain the findings required by Section (3)(b) of the Regulations, the most fundamental of which is the finding of an overall shortage of facilities required for the production of supplies necessary in the interest of national defense. Replacements, acquisitions from an affiliate, etc., must be commented on.

Reports must contain an expression of opinion whether it is to the advantage of the Government that the facilities be privately financed and must state the reasons. A favorable recommendation must contain a statement that, recognizing the Government's financial interest in a certified facility, the facilities listed in Appendix A are so essen-

tial to the progress of the war that the reporting agency recommends issuance of a certificate.

Reports must contain a statement of the percentage of cost recommended for certification.

[fol. 65] Exhibit G to Exhibit 6-E

Form GA-141

(7-20-43)

Circular Series Supplement No. 1 to General Program Circular

No. 33

Date: March 8, 1944

United States of America War Production Board

Page 1 of 3

To: All Bureau and Division Directors

Approved: J. A. Krug Program Vice Chairman

Issued through: L. M. Shea Esq. Office of Procedures

Subject: Criteria for Preparation of Recommendations for Necessity Certificates on Form GA-1231

Section 1 Purpose:

.01 The purpose of this supplement is to prescribe revised requirements for reports on applications for Necessity Certificates which are hereafter to be incorporated as part of Form GA-1231. These requirements are supplementary to the statement that was attached to memorandum to the Industry Divisions, War Production Board, and other interested Agencies from the Facilities Bureau Deputy Director for Tax Amortization, dated February 9, 1944, and are intended to clarify and expand it, but not to change it in any way. (See Page 3.)

.02 The new data is designed to furnish the information needed to make a decision on an application for a Necessity Certificate in most cases, but additional infor-

mation may, from time to time, appear to the sponsor to be pertinent or be requested by members of the staff of the Tax Amortization Branch.

[fol. 66] *Section 2 Information to be furnished by Sponsoring Agency or Division on Form GA-1231:*

.01 The following information must be supplied before applications for Necessity Certificates will be approved. Sponsoring agencies or industry divisions will be held responsible for the presentation of such data.

1. Is the end product of vital importance to the war effort? ..... If the answer is "Yes", state the basis for such a conclusion.

2. Is there an overall shortage of facilities to produce as against requirements for this product? ..... If so, explain.

3. If there is no overall shortage of facilities, is there an area shortage? ..... If so, state why it is imperative that the applicant increase production facilities rather than have the deficiency made up by another source.

4. Is acquisition or construction by the applicant of each facility listed clearly necessary for production of the end product? ..... Specify all facilities not clearly necessary.

5. Are these facilities wholly or partly a replacement? ..... If so, explain and state what part.

6. Are these facilities to be acquired from an affiliate? .....

7. Would the Government be in a good bargaining position after the War if these facilities should be publicly financed? ..... If not, state why.

8. Are they of a type that are likely to have a reasonable postwar value? ..... If not, state why.

[fol. 67] 9. Is it reasonable to assume that the facilities are of such a type that they may be useful to the applicant after the War? ..... If not, state why.

10. Comments:

11. Recommendations:

A. Based upon the foregoing it is recommended that the application be denied.

Signed .....

(over)

General Program Circular No. 33, Supp. No. 1

Page 2 of 2

B. Based on the foregoing it is our opinion that it is to the advantage of the Government that the facilities be privately financed. In addition, recognizing the Government's financial interest in a certified facility, we are of the opinion that the facilities listed in Appendix A are so essential to the progress of the War that the issuance of a certificate up to ... % of cost is recommended.

Signed .....

Section 3 Effective Date for Required Information:

.01 The revised requirements for reports on applications for Necessity Certificates given in Section 2 are to be incorporated as a part of Form GA-1231. Whether the new forms are available or not, all reports from Sponsoring Agencies, or Divisions, dated after March 10, 1944, must contain this information or they will be returned without action.

[fol. 68] *Section 4 Instruction for determining Recommendation on Form GA-1231:*

.01 By applying the answers to the questions given in Section 2 and eventually to be included on Form GA-1231, one of the following recommendations should be made:

1. That no certificate should be issued.
2. That the facilities should be partially certified (state specific percentage recommended).
3. That facilities should be certified 100%.

.02 In the event that amortization should be allowed, determination as to whether it should be 100% or partial should be made as follows:

1. One hundred percent certificate will be given only when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use, and it is not reasonable to assume that they may be useful after the war.

2. Partial certificate representing excess construction or acquisition costs over pre-war costs* will be given when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use and it is reasonable to assume that they may be useful after the war.

3. Partial certificate will be given in appropriate percentages under certain other circumstances [fol. 69] of an extraordinary nature. The following are examples:

a. When part of the facilities are appropriate for government financing and part for a 100% certificate, a percentage certificate may be issued for the entire project at a percentage which will result in same amount of tax amortization that would have been allowed had the individual items been considered separately.

b. When a facility is a replacement, but a more expensive facility is required because of special war needs than would be required for normal operations of the Company, a percentage certificate may be issued covering the excess of the cost of the facility over the cost of the type of facility that would have been otherwise required.

c. When the facility is clearly necessary to the war effort, but its capacity or cost is in excess of that

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* It is impossible to predict whether post-war costs will be above or below present costs, yet it appears equitable to relate them to pre-war costs. Accordingly, pre-war costs are to be used in determining this partial certificate, and as a general rule pre-war costs are to be considered as being those in effect during the years 1937-1939 inclusive.

which is necessary for the war effort, the percentage should be determined in such a way as to make no amortization allowance applicable to the excess capacity or cost.

General Program Circular No. 33, Supp. No. 1

Page 3 of 3

Attachment to Memorandum, February 9, 1944

Preparation of Recommendations for Tax Amortization

The Government's substantial monetary interest in facilities covered by a Necessity Certificate must be recognized. [fol. 70] Amortization represents an abnormal tax deduction and hence a loss of revenue to the Government. In the case of companies in the higher tax brackets, this may amount to 81 percent of the cost of the facilities.

No facility will be certified unless the war effort would actually be weakened by the lack thereof. This bears upon the degree of essentiality. The facility cannot be merely desirable, helpful or appropriate. It must be essential and must be required exclusively for production of one or more of the supplies enumerated in Section (3)(a) of the WPB Regulations governing the issuance of Necessity Certificates. An overall shortage of facilities in the industry or a situation covered by Section (3)(b)(ii) of the Regulations must be found to exist.

In determining whether it is to the advantage of the Government that the facilities be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market value may be assumed to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, if a facility appears to be of such a type that it would have a reasonably wide market after the war, it may generally be assumed that, provided the DPC or other government agency is will-

ing to purchase it, it would be to the advantage of the Government that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a certificate were issued, such per-
[fol. 71] centage being based, for example, on excess cost attributable to the war.

Reports must contain the findings required by Section (3)(b) of the Regulations, the most fundamental of which is the finding of an overall shortage of facilities required for the production of supplies necessary in the interest of national defense. Replacements, acquisitions from an affiliate, etc., must be commented on.

Reports must contain an expression of opinion whether it is to the advantage of the Government that the facilities be privately financed and must state the reasons. A favorable recommendation must contain a statement that, recognizing the Governments financial interest in a certified facility, the facilities listed in Appendix A are so essential to the progress of the war that the reporting agency recommends issuance of a certificate.

Reports must contain a statement of the percentage of cost recommended for certification.

Inquiries should be directed to the Tax Amortization Branch, Facilities Bureau.

* * * * * * *

[fol. 72] IN THE TAX COURT OF THE UNITED STATES

Filed March 14, 1955

Opinion

MURDOCK, *Judge:* The Commissioner determined deficiencies as follows:

Year	*Income tax*	*Excess profits tax*
1941	$32,196.29	....
1942	....	$1,426.59
1943	....	2,416,728.13
1944	91,026.81	1,032,315.21

All facts stipulated by the parties are adopted as findings of fact.

* * * * * * *

[Portion of opinion dealing with other issues omitted]

War Facility Amortization

The petitioner acquired, dissolved, and, after June 30, 1944, carried on the business of the American Bearing Corporation. American Bearing had filed applications for certificates of necessity to cover the cost of constructing facilities for the purpose of producing war products. Certificates of necessity respecting those facilities were issued pursuant to section 124 of the Internal Revenue Code, stating that the facilities "are necessary in the interest of national defense during the emergency period, up to 50% [in some 35%] of the cost." The facilities were constructed. The purpose of the certificates was to permit the petitioner to amortize the cost of the additional facilities over a period of 60 months rather than recover their cost through depreciation deductions over the normal useful lives of the facilities. The petitioner claimed accelerated depreciation for the entire cost of the facilities, but the Commissioner limited the accelerated amortization to the percentages fixed in the [fol. 73] certificates of necessity. The petitioner contends that the percentage limitations which the certifying authorities purported to impose must be ignored because they are in violation of the words of and the intention of Congress behind section 124.

Section 124(a) provides that every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis of any emergency facility based upon a period of 60 months. Subsection (e) defines emergency facility as "any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made." Section 124(f)(1) provides that in determining the adjusted basis of an emergency facility

"there shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period" under regulations prescribed by the certifying authority with the approval of the President. The certificates in question were for construction after December 31, 1939, and it is conceded that the adjusted basis of that construction is cost.

The petitioner contends that the words "only so much of the" cost refer to construction after December 31, 1939, and that the provision may not be read "the cost attributable to so much of such construction as the certifying authority has certified as necessary in the interest of national defense during the emergency period." It says the certifying authority was to certify facilities, not costs.

[fol. 74] The United States Graphite Company sought to compel the certifying authorities to issue certificates which would cover all rather than only part of the cost of facilities which it had constructed. The District Court for the District of Columbia dismissed the complaint. *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944. The Court of Appeals for the District of Columbia affirmed per curiam without opinion, but Judge Wilbur K. Miller filed a dissent in which he discussed the problem. *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, certiorari denied 339 U. S. 904. That taxpayer then sued on a claim for refund of taxes in the Court of Claims on the ground that the percentage of cost limitation on its certificates should be ignored. The Court of Claims held for the taxpayer, and the Government did not seek a writ of certiorari. *Wickes Corp.* v. *United States*, 108 F. Supp. 616.

Judge Miller, in his dissenting opinion referred to above, considered and discussed the words used by Congress, the purpose which it sought to accomplish, and the legislative history of section 124. He stated, "After exhaustive study, I have been able to discover nothing is the

language of the Act, or in its legislative history, to indicate that Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized." His interpretation of section 124(f)(1) was that it meant "there shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense." The Court of Claims came to the same conclusion. This Court believes that the reasoning [fol. 75] of Judge Miller in his dissenting opinion and of the Court of Claims is sound and that a correct interpretation of the provisions of section 124 entitles the petitioner in this case to amortize the full cost of the facilities certified over the accelerated period.

Reviewed by the Court.

Decision will be entered under Rule 50.

OPPER, J., dissents on the last issue on the authority of *United States Graphite Co.* v. *Sawyer*, (C.A., D.C. Cir.) 176 F. 2d 868, certiorari denied 339 U. S. 904; and in consonance with the dissenting opinion of Chief Judge Jones in *Ohio Power Co.* v. *United States*, (Ct. Cl., Mar. 1, 1955) — F. Supp. —.

[Tr. 744] IN THE TAX COURT OF THE UNITED STATES

DECISION—June 17, 1955

The parties filed an agreed computation on June 8, 1955, pursuant to the Court's Opinion filed March 14, 1955. Therefore, it is

Ordered and Decided, that there are deficiencies in income tax for the years 1941 and 1944 in the amounts of $36,278.97 and $90,458.58, respectively; a deficiency in excess profits tax for the year 1944 in the amount of $686,726.81; an overpayment of excess profits tax for the year 1942 in the amount of $192,008.29, which amount was paid within two years before the execution of the agreement of April 9, 1946, and an overpayment of excess profits

tax for the year 1943 in the amount of $582,669.71, which amount was paid within two years before the filing of the claim.

(Signed) J. E. Murdock, Judge.

Entered June 17, 1955

[fol. 76] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REVIEW—Filed September 14, 1955

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

The Commissioner of Internal Revenue petitions the United States Court of Appeals for the Second Circuit to review the decision of the Tax Court of the United States, entered herein on June 17, 1955, pursuant to its Opinion filed March 14, 1955 (23 T.C. — No. 123), ordering and deciding "that there are deficiencies in income tax for the years 1941 and 1944 in the amounts of $30,278.97 and $90,458.58, respectively; a deficiency in excess profits tax for the year 1944 in the amount of $686,726.81; an overpayment of excess profits tax for the year 1942 in the amount of $192,008.29, which amount was paid within two years before the execution of the agreement of April 9, 1946, and an overpayment of excess profits tax for the year 1943 in the amount of $582,669.71, which amount was paid within two years before the filing of the claim."

This petition for review is filed pursuant to Sections 7482 and 7483 of the Internal Revenue Code of 1954.

The respondent on review is organized under the laws of the State of New Jersey and has its principal office in New York, New York, and filed its federal income and excess profits tax returns for the taxable years 1941, 1942, 1943 and 1944, the years involved herein, with the Collector of Internal Revenue (now District Director of Internal Revenue) for the Second District of New York, whose office is located at New York, New York, which collection district is within the jurisdiction of the United

[fol. 77] States Court of Appeals for the Second Circuit, wherein this review is sought.

This review involves deficiencies in income tax for the years 1941 and 1944, and deficiencies in excess profits tax for the years 1942, 1943 and 1944.

[Signatures omitted]

[fol. 78] UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT, October Term, 1955.

No. 253

Docket No. 23902

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

NATIONAL LEAD COMPANY, Respondent.

OPINION—Feb. 14, 1956

Before: Clark, Chief Judge; Frank and Lumbard, Circuit Judges.

The Commissioner of Internal Revenue petitions for review of a decision of the Tax Court, J. E. Murdock, Judge, 23 T.C. 988, holding that the War Production Board had no authority to issue partial certificates of necessity under § 124 of the Internal Revenue Code of 1939 and that the taxpayer is entitled to amortization of the entire cost of facilities covered by such certificates. Reversed.

[fol. 79] H. Brian Holland, Assistant Attorney General, Lee A. Jackson, Hilbert P. Zarky, Frank E. A. Sander, Attorneys, Department of Justice Washington, D. C., for the petitioner.

Karl Riemer, Washington, D. C. (Pehle, Lesser, Mann, Riemer & Luxford, of counsel on the brief), for the respondent.

Lumbard, Circuit Judge:

This is a petition by the Commissioner for review of a decision by the Tax Court that the taxpayer was entitled to accelerated amortization under § 124 of the Internal Revenue Code of 1939 (as amended) of the entire cost of certain "emergency facilities" constructed during World War II. Section 124(e)(1) provided:

> "As used in this section, the term 'emergency facility' means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made."

Section 124(f)(1) provided for the inclusion in the basis of such an emergency facility of:

> "so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period which certification shall be under such regulations as may be pre- [fol. 80] scribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President."

Section 124(f)(3) further provided that:

> "In no event and notwithstanding any of the other provisions of this section, no amortization deduction shall be allowed in respect of any emergency facility for any taxable year—(C) unless a certificate in respect thereof under paragraph (1) shall have been made (i) prior to the filing of the taxpayer's return for such taxable year, or prior to the making of an election * * * to take the amortization deduction, or (ii) before December 1, 1941, whichever is later * * *"

On December 17, 1943 the President transferred the certifying function to the War Production Board. Executive Order 9406, 8 Fed. Reg. 16955. In 1944 the Board issued to the taxpayer certificates that the facilities now in question "are necessary to the national defense during the emergency period, up to 50% [or in some cases 35%] of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof * * *" It appears that these partial certificates were issued pursuant to a policy of the WPB, adopted toward the end of the war, of certifying only that part of the cost of a facility attributable to excess war costs.

In filing its return for 1944 the taxpayer claimed accelerated amortization only for the percentage of the cost which had been certified, taking ordinary depreciation on the rest. When the Commissioner subsequently asserted a deficiency against the taxpayer for the year 1944 based on other grounds, the taxpayer filed a petition with the Tax Court on November 21, 1951, seeking to have that Court review the deficiency. On April 9, 1954 the taxpayer filed an amended petition, claiming for the first [fol. 81] time that the WPB had no authority under the statute to certify only excess war costs, and that it is entitled to amortization of the entire cost of the facilities. The Tax Court accepted this argument.

The question whether the WPB had authority to issue these partial certificates presents as interesting problem of statutory interpretation on which courts have differed. Compare *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, aff'd *sub nom. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, cert. denied, 339 U. S. 904, with *Wickes Corp.* v. *United States*, 108 F. Supp. 616 (Ct. Cl. 1952) and *Ohio Power Co.* v. *United States*, 129 F. Supp. 215 (Ct. Cl. 1955), cert. denied 350 U. S. 862. We do not reach this question, however, since we conclude that the taxpayer no longer has any right to raise the issue.

The statutory provisions set out above map out a scheme in which the function of determining whether facilities are necessary to the national defense is entrusted solely to the WPB. The determination whether facilities are necessary is within that agency's discretion and is

conclusive so long as the discretion is exercised on the basis of criteria not clearly irrelevant to the statutory purpose. An exercise of the agency's discretion is preliminary to any right to claim accelerated amortization under the Code. The agency's decision ordinarily must take place and be evidenced by a certificate made prior to the time when a tax return for the year in question is filed.

It seems clear that if the WPB had denied a certificate altogether on the ground that the facilities were not necessary to the national defense, there would be no review of that action in any forum. Even if the WPB had refused to exercise its discretion or had based its decision on grounds impermissible under the statute, the failure to issue a certificate could not be challenged in the Tax [fol. 82] Court. That Court could not exercise the discretion committed to the WPB under the statute and would therefore be incapable of correcting that agency's error.

But the taxpayer urges that we do not have that problem here because it was implicit even in the issuance of the partial certificates that the WPB had determined the facilities to be necessary to the national defense. We do not agree. The certificates stated only that the facilities were "necessary to the national defense up to 50% [or 35%] of the cost." This statement did not explicitly say that the facilities were necessary in their entirety. Nor is it implicit in the certificate given that the WPB would have determined the facilities to be necessary if the consequence of that determination had been to allow accelerated amortization of the entire cost. The taxpayer's argument on this point follows that of the Court of Claims in *Wickes Corp.* v. *United States, supra.* The Court there said:

> "The Government suggests that if the Board could not have limited its certificate to 35% of the costs of the facilities, it would, perhaps, not have certified them at all. We have no reason to suppose that the Board, when applied to by the plaintiff for a factual statement as to whether the plaintiff's facilities were, or were not 'necessary in the interest of national defense during the emergency period,' would

> have said to itself, 'If we make a true statement it will cost the Government X dollars in lost revenue. If it would cost the Government only Y dollars, we would tell the truth. But since it will cost X dollars, we will not tell the truth.' "

The difficulty with this argument is that it assumes the determination of a facility's necessity to the national defense to be a black-or-white proposition ascertainable with- [fol. 83] out reference to the cost to the Government. The determination whether a given facility was "necessary" was a policy question involving the weighing of many factors. Among these were the importance of the facility in the scheme of national defense and the cost of the facility to the Government in lost revenues. The certifying authority had to weigh importance against cost and determine whether that cost could best be expended there or elsewhere, and whether the desired facility could best be obtained through private financing with rapid amortization or through government financing. It is therefore evident that the partial certificates which the Board issued represented only a determination that the facility was necessary on the assumption that 35% or 50% rapid amortization would be allowed. If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the determination as to necessity might not be the same.

Since the Board never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. Neither that court nor any other court could make the determination of necessity entrusted to the Board. Cf. *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20-21 (1952). The proper way in which to challenge the Board's alleged error was to attack it directly by mandamus in the District of Columbia. The courts of the District have entertained mandamus proceedings for that purpose, *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, D. C. D. C. (1944), aff'd *per curiam sub nom.*, *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (D. C. Cir. 1949), cert. denied, 339 U. S. 904, and

the remedy was altogether appropriate. If the petitioner had sought mandamus or appropriate injunctive relief in [fol. 84] the District of Columbia and had been successful, a prompt and proper exercise of the Board's discretion would still have been possible. Instead the petitioner chose to accept the benefit of the partial certificate without claiming that it was based on an action outside the authorization of the statute. It is now impossible for any court or administrative agency or official to make a proper determination of necessity based on the considerations relevant in 1944 when the certificate was issued. In any event no one can now summon up or accurately recall the relevant conditions which existed over ten years ago. Under these circumstances the taxpayer has forfeited his right to challenge the Board's action. Cf. *Callanan Road Improvement Co.* v. *United States,* 345 U. S. 507, 512-13 (1953). The language of the Supreme Court in the *Callanan* case is quite pertinent here:

> "The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. If the appellant then had taken the position it seeks now, the Commission might conceivably have refused its approval of the transfer. The appellant accepted the transfer with the limitations contained in the certificate. The appellant now will not be heard to say it is entitled to receive more than its transferor had or the certificate transferred gave." 345 U. S. at 513.

The taxpayer here may well have been denied a certificate altogether if it had challenged the Board's action. Having accepted the certificate it is now bound by its limitations.

The decision of the Tax Court is reversed.

[fol. 85] UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

* * * * * * *

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

NATIONAL LEAD COMPANY, Respondent.

JUDGMENT—Feb. 14, 1956

Appeal from the Tax Court of the United States

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said the Tax Court of the United States be and it hereby is reversed in accordance with the opinion of this Court.

(S) A. Daniel Fusaro, Clerk.

[fol. 85A-86] Petition for rehearing covering 7 pages filed omitted from this print. It was denied, and nothing more by order.

[fol. 86] UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[Title Omitted]

ORDER DENYING PETITION FOR REHEARING—March 12, 1956

A petition for a rehearing having been filed herein by counsel for the Respondent,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

(S) A Daniel Fusaro, Clerk.

[fol. 87-88] UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title Omitted]

PER CURIAM ORDER DENYING PETITION FOR REHEARING—March 12, 1956

Petition denied.

C.E.C., I.N.F., J.E.L., C.J.J.

Filed March 12, 1956.

* * * * * * *

[fol. 89] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 90] SUPREME COURT OF THE UNITED STATES

[Title Omitted]

ORDER ALLOWING CERTIORARI—Filed June 11, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 923.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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MAY 29 1956
HAROLD B. WILLEY, Clerk

No. 988 124

IN THE

Supreme Court of the United States

October Term, 1955

NATIONAL LEAD COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and Regulations involved	3
Statement	3
Reasons for granting the writ	
1. The decision of the Court below is in direct conflict with decisions of the Court of Claims	7
2. Section 124 did not authorize the limitation of amortizable cost to the excess war cost of certified facilities having likely post-war use	8
3. The decision of the Court below denies the taxpayer the remedy expressly prescribed by statute and mandamus was not available as a remedy	12
4. The Court below disregarded an essential finding of fact by the Tax Court, supported by the evidence, and substituted its own	16
5. Neither waiver, estoppel nor collateral attack was pleaded, briefed, argued or passed upon in the Tax Court. Accordingly, no such issue should have been considered by the Court of Appeals	18
6. The Court below should have at least remanded the case to the Tax Court	19
Conclusion	24
Appendix A	1a
Appendix B	4a
Appendix C	10a
Appendix D	14a
Appendix E	15a

CITATIONS

Cases: Page

Adams v. *Nagle*, 303 U.S. 532 ..... 13, 14, 15, 16
Allen-Bradley Co. v. *U. S.*, April 3, 1956, not yet reported 4, 7
Callanan Road Improvement Company v. *United States*, 345 U.S. 507 22
Carnegie Center Co. v. *Commissioner*, 22 T.C. 1189 18
Collins v. *Commissioner*, 18 T.C. 99, aff'd 203 F. 2d 565 18
Dobson v. *Commissioner*, 320 U.S. 489 18
Ex parte Baldwin, 291 U.S. 610 14
Ex parte Republic of Peru, 318 U.S. 578 14
Fuld v. *Commissioner*, 139 F. 2d 465 18
General Utilities & Operating Co. v. *Helvering*, 296 U.S. 200 ..... 18, 19, 23
Helvering v. *Rankin*, 295 U.S. 123 ..... 18, 23, 24
Helvering v. *Salvage*, 297 U.S. 106 19
Hollister v. *Commissioner*, 44 B.T.A. 851 18
Hormel v. *Helvering*, 312 U.S. 552 ..... 7, 19, 21
Hudson v. *Texas Gulf Sulphur Co.*, 72 F. 2d 251, *cert.* den., 293 U.S. 617 20
John Kelley Co. v. *Commissioner*, 326 U.S. 521 18
Lowe Brothers Co. v. *United States*, 304 U.S. 302 ... 12
National Nickel Co. v. *Nevada Nickel Syndicate*, 112, Fed. 44, *cert.* den., 184 U.S. 700 18
Ohio Power Co. v. *U. S.*, 129 F. Supp. 215 *cert. den.*, 350 U.S. 862, rehearing den., 350 U.S. 919, ——— 4, 5, 7
Red Canyon Sheep Co. v. *Ickes*, 98 F. 2d 308 ..... 13, 15
Swift, etc. Company v. *United States*, 111 U.S. 22 ... 22
United States v. *Bethlehem Steel Corp.*, 315 U.S. 289 20
United States v. *Knox*, 102 U.S. 425 16
Union Pacific R.R. Co. v. *Commission*, 248 U.S. 67 22
United States Graphite Co. v. *Harriman*, 71 F. Supp. 944, aff'd, *sub. nom.*, *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, *cert. den.*, 339 U.S. 904 ..... 6, 14, 15, 16, 23
United States Graphite Co. v. *Sawyer*, 176 F. 2d 868, dissenting opinion of Miller, J. 4, 8
Wickes Corp. v. *U. S.*, 108 F. Supp. 616 ..... 4, 5, 7, 8, 16
Wilbur v. *United States ex rel. Kadrie*, 281 U.S. 206 ..... 14, 15

Statutes: Page

Act of Oct. 16, 1941, c. 445, 55 Stat. 742 23

Act of March 27, 1942, c. 199, Tit. VI, Secs. 601, 602, 56 Stat. 181 23

Internal Revenue Code of 1939
Section 23 (t) 3
" 124 ..... 2, 3, 11, 12, 14, 24
" 124A 11
" 272 12
" 322(d) 12
" 732 12

Tit. 28 U.S.C.
Section 1254(1) 2
" 1340 12

Miscellaneous:

Cong. Rec., August 29, 1940, p. 11240 10
Executive Order 9841, 12 F.R. 2645 19
Federal Rules of Civil Procedure, Rule 8(c) 18
Hearings, Senate Committee on Finance, Second Revenue Act of 1940, 76th Cong., 3d Sess. 9, 10
Information Please Almanac (Washington *Star* Ed.) 21, 22
Senate Report 2375, 81st Cong., 2d Sess. 12
Tax Court Rules of Practice, Rule 14 ..... 7, 18
Treasury Regulations 111, Sec. 29.124-6 3
United States v. *The Allen-Bradley Co.*, No. 923, October Term, 1955 ..... 4, 5, 8
United States v. *The Ohio Power Co.*, No. 312, October Term, 1955 ..... 5, 6, 8

IN THE

Supreme Court of the United States

October Term, 1955

No.

NATIONAL LEAD COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, National Lead Company, respondent below, prays that a writ of *certiorari* issue to review the judgment of the Court of Appeals for the Second Circuit in the above-entitled case.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (App. A, pp. 1a-4a, *infra*) are reported at 23 T.C. 988, 1002. The opinion of the Court of Appeals for the Second Circuit (App. B, pp. 4a-10a, *infra*) is reported at 230 F. 2d 161.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit, reversing the Tax Court, was entered February 14, 1956. The taxpayer's timely petition for rehearing, filed on February 29, 1956, was denied by Order entered March 12, 1956. The jurisdiction of this Court is invoked under ~~Tit.~~ 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the War Production Board, in issuing a certificate of necessity under Section 124 of the Internal Revenue Code of 1939, could, because the facility certified was likely to have post-war use, validly limit the effectiveness of such certificate to only that part of the cost of the facility certified, as was considered to represent the excess of the war-time cost over the peace-time cost of the facility.

2. Whether the validity of such a percentage of cost limitation attached by the War Production Board can be determined in a proceeding involving tax liability and overpayment.

3. Whether the Court of Appeals for the Second Circuit erred in disregarding findings of fact by the Tax Court supported by the evidence, and substituting its own findings.

4. Whether the Court of Appeals for the Second Circuit erred in passing upon an issue not raised in the Tax Court by the pleadings or otherwise, and which was not considered or passed upon by the Tax Court.

5. Whether, on its theory of the case, the Court of Appeals for the Second Circuit erred in failing to remand the case to the Tax Court for further proceedings.

STATUTES AND REGULATIONS INVOLVED

The statutory provision involved are Sections 23(t) and 124 of the Internal Revenue Code of 1939, and the Regulations involved are Treasury Regulations 111, Section 29.124-6, all of which are set forth in App. C, pp. 10a-14a, *infra*.

STATEMENT

In the proceedings before the Tax Court, the facts were fully stipulated by the parties. The stipulated facts were adopted by the Tax Court as its findings of fact, 23 T.C. 988, 989; App. A, p. 1a, *infra*. The facts, as so stipulated and found, may be summarized as follows:

During World War II the petitioner (the "taxpayer") was engaged in the manufacture of engine bearings. Requiring additional facilities for such purpose, the taxpayer applied to the War Production Board (the "Board") for certificates under Section 124 that the facilities were "necessary in the interest of national defense during the emergency period". Such certificates would permit the taxpayer in computing taxable income to elect to take amortization deductions spread over a five-year period, rather than the ordinary depreciation deductions spread over the normal useful lives of the facilities.

The Board issued four certificates in respect of the facilities. The Board, however, had adopted a policy designed to limit amortization to estimated excess war costs in the case of facilities having possible post-war utility. Pursuant to that policy, the certificates were framed as follows (R. 5, 6):

> It is hereby certified that the facilities * * * are necessary in the interest of national defense dur-

> ing the emergency period, up to 35 per cent of the cost attributable to the construction * * * or acquisition thereof * * *.

In one instance, the percentage was 50 per cent.

When the taxpayer filed its tax returns, it elected to take the amortization deductions. In computing its amortization deductions, the taxpayer gave effect to the percentage of cost limitations contained in the certificates.

Subsequently, the Commissioner asserted deficiencies against the taxpayer on grounds unrelated to the amortization issue here presented, whereupon the taxpayer duly filed its petition to the Tax Court. By amended petition, timely filed, the taxpayer claimed overpayment in that it had taken amortization deductions only to the percentages of the costs of the certified facilities that were specified in the certificates, whereas it should be allowed amortization deductions based upon their full costs.

The Tax Court, one judge dissenting, sustained the taxpayer's contention, expressing agreement with the majority views of the Court of Claims in *Wickes Corp.* v. *U.S.*, 108 F. Supp. 616, which that Court has since reiterated in *Ohio Power Co.* v. *U.S.*, 129 F. Supp. 215, and *Allen-Bradley Co.* v. *U.S.*, April 3, 1956, not yet reported, App. D, pp. 14a-15a, *infra*, and with the dissenting opinion of Judge Miller of the Court of Appeals for the District of Columbia in *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868. The Court of Appeals for the Second Circuit reversed.

The controversy is of the same cloth as that currently before this Court upon the Government's petition for a writ of *certiorari* to the Court of Claims in *United*

States v. *The Allen-Bradley Co.*, No. 923, and recently in *U. S.* v. *Ohio Power Co.*, No. 312, in which the Government made three unsuccessful efforts for *certiorari*, 350 U.S. 862, 919 and ——, May 28, 1956. The controversy stems from World War II legislation enacted to encourage industrial expansion needed in the war effort by permitting accelerated amortization deductions, for tax purposes, with respect to new and expanded facilities certified as necessary to the national defense. In the period here pertinent the Board was the certifying agency. The Board took the position that where a proposed facility, necessary to the national defense, was likely to have post-war utility, accelerated amortization should be limited to the excess cost of war-time construction or acquisition, and pursued a policy in such cases of issuing certificates for less than 100 per cent of cost. The ultimate questions common to this, the *Ohio Power* and the *Allen-Bradley* case, are whether the War Production Board's action in so limiting its certificates was within its authority and, if not, whether a holder of a certificate for less than 100 per cent of cost is entitled to amortize the full cost of the property during the accelerated statutory period.

While the Court below said that it did not reach the first of these questions, it in fact proceeded, 230 F. 2d at 164, App. B, pp. 8a, 9a, *infra*, to analyze the statute and to reach the conclusion that the Board had discretion under the statute to issue certificates with respect to less than 100 per cent of cost. The Court expressed disagreement with the reasoning in *Wickes* and interpreted the certificates as certifying the facilities as being only partially necessary to the national defense —i.e., only to the extent of the specified percentages of their costs—thus completely ignoring the finding of

the Tax Court, adopting the stipulation of fact between the parties which the Commissioner summarized in his main brief below, p. 4, as follows:

> All these partial certificates were issued pursuant to the then policy of the War Production Board of * * * certifying only that portion of the cost representing excess war costs where the facility had clear post-war use.[1]

The Court below answered the second question by holding that the Board's authority to issue a limited certificate could not be challenged in this proceeding, and that the taxpayer's only remedy was mandamus against the Board. For the proposition that such relief was available, the Court cited *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, aff'd *sub. nom., United States Graphite Company* v. *Sawyer*, 176 F. 2d 868, *cert. den.*, 339 U.S. 904. The Court below held that by its failure to pursue such remedy at the time of the issuance of the certificates and by its "acceptance" thereof, the taxpayer had "forfeited" its right to challenge the Board's action. 230 F. 2d at 165, App. B, p. 9a, *infra*.

Whether the authority of the Board to issue a limited certificate could be challenged in this proceeding was

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[1] In its main brief below (p. 1) the taxpayer stated that it took "no issue" with the Commissioner's statement of the case. It is thus without warrant that it was asserted in the brief of The Ohio Power Company submitted in opposition to the Government's motion in *United States* v. *The Ohio Power Company*, No. 312, p. 17, that "[t]he record in *National Lead* fails to show what the percentages in those certificates represented"; i.e., excess capacity over that necessary to national defense or notwithstanding that the whole of the facility was found necessary to national defense, excess of wartime cost over peace-time cost where post-war use was reasonably anticipated. *Id.* pp. 15, 16. See Gov't Rep. Br. in No. 312, p. 3.

not raised by the Commissioner in his answer or otherwise in the Tax Court notwithstanding the provision of Rule 14 of the Tax Court's Rules of Practice that

> The answer shall be so drawn as fully and completely to advise the petitioner and the Court of the nature of the defense.

It was raised for the first time in the Commissioner's main brief, pp. 41-47, in the Court of Appeals. Upon its petition for rehearing in the Court below, the taxpayer urged that if the Court should adhere to its decision to reverse, it should nevertheless remand the case to the Tax Court, to afford the taxpayer an opportunity to improve the record on this score, if it could. *Hormel* v. *Helvering*, 312 U.S. 552. The Court below declined to do so.

REASONS FOR GRANTING THE WRIT

1. *The decision of the Court below is in direct conflict with decisions of the Court of Claims.* The decision below is in direct conflict with the *Wickes*, *Ohio Power*, and *Allen-Bradley* cases decided in the Court of Claims. In *Allen-Bradley*, that Court expressly recognized the decision of the Court below as being "contrary" to its own decisions, and refused to follow it. App. D, p. 14a, *infra*.

While it might be suggested that a distinction is to be found in that *Wickes* and *Ohio Power* were grounded squarely on a construction of the statute, while here the Court purported to base its decision on some form of estoppel, waiver, or collateral attack, any such distinction is patently illusory. For, the question whether the authority of the Board to

issue limited certificates could be challenged in a tax proceeding was necessarily decided by the Court of Claims in the affirmative *sub silentio,* if such issue was involved in the litigations before it notwithstanding its not having been raised in pleadings, briefs, or arguments. Conversely, if, by reason of the failure of the Commissioner to raise any such issue in the Tax Court, the issue was not properly before the Court below, then, too, any such distinction evanesces. But whatever the niceties, if there be any, it is not meet that the result under a statute of the United States should differ in identical circumstances and should depend, yea or nay, upon the court before which the question happens to arise. In *Allen-Bradley,* however, the decision of the Court below was expressly rejected by the Court of Claims. In the Government's pending petition in *Allen-Bradley,* No. 923, (pp. 10, 11) it is stated that according to the Internal Revenue Service "there are at least 39 pending cases involving the same problem" with a total of approximately $62,000,000 at stake in all cases.

2. *Section 124 did not authorize the limitation of amortizable cost to the excess war cost of certified facilities having likely post-war use.* Section 124 conferred no such authority, certainly not expressly and plainly not by implication; and its legislative history is clear that none was intended. For these propositions reliance is put squarely on Judge Miller's dissent in *Graphite,* 176 F. 2d 868, 870, 871, and on the majority opinion in *Wickes,* 108 F. Supp. 616, 619, 620. To what is said there, we need only add the following further references to the legislative history.

In addition to the testimony quoted by Judge Miller, Assistant Secretary of the Treasury Sullivan testified

(Hearings, Senate Committee on Finance, Second Revenue Act of 1940, 76th Cong., 3d Sess., pp. 125, 127):

> Under this law, it may be prudent, it may be the wise thing to do; but I couldn't say to this committee that it is reasonable to expect that an ultra-modern factory that is to be constructed in the latter part of 1940 or the first part of 1941, built with all of the latest skill and engineering experience, is going to be absolutely useless in 1946. I don't think that is "reasonable," and yet I believe it is desirable and prudent to grant this amortization to those companies that are putting up new facilities for this picture.
>
> * * *
>
> We don't know that that [i.e., a five-year period or less] is the expected useful life. There are certain facilities that are being constructed for purely national-defense projects, which may be just as useful after the war is over, or the present emergency is over, or the particular contract they are built to perform is over, as they are during the time that contract is being performed.
>
> * * *
>
> SENATOR GEORGE. We take it to be your judgment on that question that these added facilities are going to become either what we now call for lack of better term, in "obsolescence" or that the depreciation is going to absorb all the value within the statutory period that follows the issuance of this certificate.
>
> MR. SULLIVAN. Excuse me, Senator George, that is not our judgment. We don't know that they are. We are saying that regardless of whether or not they do, it is prudent and wise to confer this special privilege of assuming that they are going to—

SENATOR GEORGE (interposing). But we are writing it in the law?

MR. SULLIVAN. That is right.

William S. Knudsen, a member of the Advisory Commission to the Council of National Defense, testified in a similar vein (*id.*, 159):

> If, at the end of the emergency, it turns out that plant facilities are useful for productive purposes during the emergency period only, the taxpayer is being only fairly dealt with by allowing him to charge off his plant against taxable income during the emergency period. If, however, the plant has productive use after the emergency period is terminated, there is no over-all advantage to the taxpayer in the rapid amortization because during the period after the emergency it will no longer be able to deduct depreciation or amortization on the plant, it having already been completely written off for tax purposes.

When the bill was being debated on the floor of the House, Representative Boehne, a member of the Ways and Means Committee and of its subcommittee on Internal Revenue Taxation, made the following statement (Cong. Rec., Aug. 29, 1940, p. 11240):

> Now just what do these amortization provisions do? First, they fix the useful life of facilities certified to be necessary in the national defense as 5 years. They remove all problems of proof.
>
> Second, there is no bounty, bonus, or windfall involved. Introducing certainty into the present provision is a desirable improvement. It is designed to give the manufacturer, who is asked to furnish needed new facilities, only a fair break.
>
> Finally, the effect of the clearing-up process is to give a straight-line basis—20 percent a year—
> * * *.

* * *

> In the present national emergency, business is asking no favor of the Government when it merely desires the certainty that private capital expended to construct, or used to acquire, a needed new facility, certified to be necessary for the national defense, may under this law be amortized over a 5-year useful life, which is what business is being told is the present program. If the emergency lasts longer * * * no further deductions * * * will be allowed. The proposed amortization provisions will do no more than is fair and just. It will certainly aid national defense.

And if the contemporary history is not enough, there is subsequent legislative history of significance. The Korean emergency brought on a new defense production program, and with it new amortization legislation. The new provision, incorporated into the 1939 Code as Section 124A, includes a subsection (e)(1), which, with one outstanding addition, is substantially the same as subsection (f)(1) of Section 124, the provision here involved. The new enactment, with the addition emphasized, follows:

> (e) Determination of Adjusted Basis of Emergency Facility.—In determining, for the purposes of subsection (a) or subsection (g), the adjusted basis of an emergency facility—
>
> (1) There shall be included only so much of the amount of the adjusted basis of such facility (computed without regard to this section) as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1949, as the certifying authority, designated by the President by executive order, has certified as necessary in the interest of national defense during the emergency period, *and only such portion of such amount as such authority has certified as attributable to defense purposes.* * * *

The Senate Committee on Finance said of this change (S. Rept. 2375, 81st Cong., 2d Sess., p. 59):

> The bill provides that a portion of the facility may be designated as essential. *There was no similar provision under the World War II legislation,* but certificates limiting amortization to a percentage of the total cost of a facility were issued in the closing months of the war. (Emphasis supplied.)

3. *The decision of the Court below denies the taxpayer the remedy expressly prescribed by statute and mandamus was not available as a remedy.* The *ratio decidendi* of the Court below rests upon a demonstrably false premise and, if allowed to stand, its decision would inevitably become authority to subvert a principle enunciated by this Court time and time again as being essential to a demarcation between the judicial and executive functions.

Neither Section 124, under the authority of which the certificates of necessity were issued, nor any other legislation makes provision for the judicial or other review of the action of the certifying agency, as such. But in tax controversies with the Commissioner, on whatever basis, under the 1939 Code, as under its predecessors and successor, the taxpayer's statutory remedy is to seek resolution of the question in the Tax Court as provided by the Code or by action for refund in the Court of Claims or a District Court. *Lowe Brothers Co.* v. *United States,* 304 U.S. 302; Tit. 28 U.S.C., Sec. 1346. Upon the Commissioner's assertion of a deficiency the taxpayer followed the procedures and invoked the jurisdiction of the Tax Court prescribed in Sections 272, 732 and 322(d) of the Internal Revenue Code of 1939. The section last cited specifically provides:

> If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. * * *

The holding of the Court below, however, is that notwithstanding the clear and all-inclusive language of the statutes, the ordinary remedies are not available to a taxpayer when the controversy has its root in the effect to be given a certificate of necessity issued under Section 124, an integral part of the Internal Revenue Code. Thus, the Court below said, 230 F. 2d at 165, App. B, p. 9a, *infra*.

> The proper way in which to challenge the Board's alleged error was to attack it directly by mandamus in the District of Columbia. The courts of the District have entertained mandamus proceedings for that purpose, *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944 * * * aff'd *per curiam, sub nom., United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 * * * cert. denied, 339 U.S. 904, and the remedy was altogether appropriate.[2]

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[2] In the next sentence the Court below added an application for "appropriate injunctive relief" to mandamus as "the" remedy which the taxpayer might have, nay, alone could have pursued. But the principles applicable in the circumstances to injunctive relief are no different from those governing mandamus. Cf. *Adams* v. *Nagle*, 303 U.S. 532, 542; *Red Canyon Sheep Co.* v. *Ickes*, 98 F. 2d 308, 322. Accordingly, the two "remedies" prescribed by the Court below may properly be considered as one and the same, and are herein so treated.

But the statutory provisions apply to *all* tax controversies and make no exception for overpayment resulting from a misconstruction of Section 124. And there is a curious inversion inherent in the holding that the availability of the *extraordinary* remedy of mandamus rendered unavailable the *ordinary* remedies prescribed by statute, for mandamus is "usually denied where other adequate remedy is available". *Ex parte Republic of Peru,* 318 U.S. 578, 584; *Ex parte Baldwin,* 291 U.S. 610. Moreover, the Court below was manifestly in error in holding that mandamus was available as a remedy. This Court has repeatedly said, as it did in *Wilbur* v. *United States ex rel. Kadrie,* 281 U.S. 206, 218, 219:

> Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus * * *. But where the duty is not thus plainly prescribed but depends upon a statute * * * the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

And, while in such a case, as this Court said in *Adams* v. *Nagle,* 303 U.S. 532, 543, the administrative officer's

> errors may be subject to subsequent correction, they cannot be enjoined * * *. *To hold otherwise would render orderly administrative procedure impossible.* (Emphasis supplied.)

Nor in *Graphite* did the District Court (or the Court of Appeals which affirmed *per curiam* on Judge Pines' opinion) misunderstand, as did the Court below, the

limited nature of its jurisdiction on mandamus. For, in *denying* mandamus, Judge Pine said, 71 F. Supp. at 946:

> * * * but in any event, defendant's construction being reasonable, it cannot be set aside by the courts in this proceeding * * *.
>
> * * * Thus there is no showing that the exercise of this discretion comes within the exception permitting courts to intervene. *So far as its exercise involves interpretation of the statute* * * *, *the statement made in the preceding paragraph is equally applicable* * * *. (Emphasis supplied.)

Heading the list of the many cases in this Court and the Court of Appeals for the District of Columbia cited by Judge Pines in support of the foregoing are *Adams* v. *Nagle* and *Wilbur* v. *United States ex rel. Kadrie, supra.* And while Judge Pine and the majority of the Court of Appeals may have agreed with the Board's construction of the statute, it is clear that mandamus would equally have been refused if they had disagreed with the Board's interpretation, provided only they found it reasonable. For, if the law be otherwise elsewhere, the Court of Appeals for the District of Columbia has frequently said, as it did in *Red Canyon Sheep Co.* v. *Ickes,* 98 F. 2d 308, 322, one of the many authorities to the same effect cited by Judge Pines:

> The rule is, of course, too well settled to require discussion that mandamus will not issue to interfere with the discretion of an administrative officer in construing a statute *even though the court would construe the statute otherwise, provided the officer's construction is reasonably possible.* (Emphasis supplied.)

Thus, all *Graphite* stands for is that the Board's construction was not necessarily unreasonable so as to permit judicial interference *in limine* by mandamus. But, the refusal of mandamus does not preclude "subsequent correction". *Adams* v. *Nagle, loc. cit. supra.* The Government itself recognized this when, after the decision in *Graphite,* the plaintiff, by then merged into the Wickes Corp. under that name, brought an action in the Court of Claims for tax refund, and made the same contention, with success, that it had made upon its unsuccessful application for mandamus. In the later case the Government, quite properly, did not plead *res adjudicata,* for the only question in *Graphite* was whether the Board's construction was "reasonably possible", while the issue in *Wickes* was whether it was correct. So long as it stands unreversed, the opinion below will lend authority to a heresy which, as this Court has said, "would render orderly administrative procedure impossible". *Adams* v. *Nagle, loc. cit. supra.*[3]

4. *The Court below disregarded an essential finding of fact by the Tax Court, supported by the evidence, and substituted its own.* The Court below said, 230 F. 2d at 164, App. B, pp. 8a, 9a, *infra.*

> * * * The determination whether a given facility was "necessary" was a policy question involving the weighing of many factors. Among these were the importance of the facility in the scheme of national defense and the cost of the facility to the

[3] In the case cited, this Court struck down as erroneous the view taken by a "number of Federal courts" on the basis of broad language used in *United States* v. *Knox,* 102 U.S. 425, that the remedy for "clear error of law" on the part of a public officer was by direct attack for mandamus or injunctive relief. See 303 U.S. at 541, 542.

> Government in lost revenues. The certifying authority had to weigh importance against cost and determine whether that cost could best be expended there or elsewhere, and whether the desired facility could best be obtained through private financing with rapid amortization or through government financing. It is therefore evident that the partial certificates which the Board issued represented only a determination that the facility was necessary on the assumption that 35 per cent or 50 per cent rapid amortization would be allowed. If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the determination as to necessity might not be the same.
>
> Since the Board never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. * * *

But the case was tried to the Tax Court on stipulations of facts between the parties, which the Tax Court adopted in their entirety, 23 T.C. 988, 989, App. A, p. 1a, *infra,* and included among the stipulations was one which set forth "the reasons for the percentage limitations appearing on the face of the" certificates. (Comm'r's. Br. below, p. 5, n. 3). In his main brief to the Court below, the Commissioner summarized this stipulation, and of necessity, the consequent finding of the Tax Court, as follows (pp. 5-6):

> All these partial certifications were issued pursuant to the then policy of the War Production Board of * * * certifying only that portion of the cost representing excess war costs where the facility had clear post-war use. In the ordinary case this excess war cost was considered to be 35 per cent.

With this the taxpayer is in agreement, and so stated in its brief below (p. 1).

Thus, the parties stipulated and the Tax Court found, as fact, that the percentage represented not the *extent* to which the Board determined the facility necessary to the war effort, as the Court below presumed to find, but the *estimated excess of war cost over the estimated peace-time cost* of a facility necessary in the national defense, but having post-war utility.

The finding of the Tax Court was supported by the evidence, and as such was conclusive: It was error for the Court below to disregard this finding and to substitute its own. *Dobson* v. *Commissioner,* 320 U.S. 489; *John Kelley Co.* v. *Commissioner,* 326 U.S. 521; *Fuld* v. *Commissioner,* 139 F. 2d 465. "The Court of Appeals is without power, on review of proceedings of the Board of Tax Appeals, to make any findings of fact." *Helvering* v. *Rankin,* 295 U.S. 123, 131.

5. *Neither waiver, estoppel nor collateral attack was pleaded, briefed, argued or passed upon in the Tax Court. Accordingly, no such issue should have been considered by the Court of Appeals.* Waiver, estoppel and collateral attack are defenses properly to be pleaded affirmatively. Cf. Rule 8(c) of the Federal Rules of Civil Procedure; *National Nickel Co.* v. *Nevada Nickel Syndicate,* 112 Fed. 44, *cert.* denied 184 U.S. 700; *Hollister* v. *Commissioner,* 44 B.T.A. 851; *Collins* v. *Commissioner,* 18 T.C. 99, aff'd 203 F. 2d 565; *Carnegie Center Co.* v. *Commissioner,* 22 T.C. 1189. This is necessarily so if the answer is "fully and completely to advise the petitioner and the Court of the nature of the defense." Tax Court Rule 14. The Rule of the Tax Court is clear. So are *General Utilities & Op-*

erating Co. v. *Helvering*, 296 U.S. 200, and *Helvering* v. *Salvage*, 297 U.S. 106. In the latter case this Court said, 297 U.S. at 109:

> The defense of estoppel was not before the Board. Under what we regard as the corect practice * * * the court should have passed the point.

6. *The Court below should have at least remanded the case to the Tax Court.* If notwithstanding the stipulation between the parties and the findings of the Tax Court, there remained any question as to what the Board was doing when it issued the limited certificates, or if the question of the Board's authority was necessarily to be litigated in some other forum before a resolution of the instant tax controversy, then, as the taxpayer asked upon petition for rehearing, the Court below should have remanded the case to the Tax Court to afford the taxpayer an opportunity to improve the record, if he could. *Hormel* v. *Helvering*, 312 U.S. 552.

The nature of the Board's action was not in controversy before the Tax Court. It was the subject of stipulation. Any question left open by the stipulation was subject to resolution by the introduction into the record of the relevant files of the Board or by other means. Similarly, if the instant tax controversy could not be resolved absent a judgment in an action between the taxpayer and the Board, the latter's successor, the Secretary of Commerce,[4] is amenable to process, and the taxpayer should have been given an opportunity to correct the record by introducing, if he could, an appropriate judgment.

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[4] Executive Order 9841, 12 F.R. 2645.

While in denying the taxpayer's petition for reargument the Court below rendered no opinion, more than a clue to its reasons for not remanding is apparent from the opinion it did hand down. Thus, the Court below said, 230 F. 2d 165, App. B, p. 9a, *infra*.

> * * * If the petitioner [*sic*] had sought mandamus or appropriate injunctive relief in the District of Columbia and had been successful, a prompt and proper exercise of the Board's discretion would still have been possible. Instead the petitioner chose to accept the benefit of the partial certificate without claiming that it was based on an action outside the authorization of the statute. It is now impossible for any court or administrative agency or official to make a proper determination of necessity based on the considerations relevant in 1944 when the certificate was issued. In any event no one can now summon up or accurately recall the relevant conditions which existed over ten years ago. Under these circumstances the taxpayer has forfeited his right to challenge the Board's action. * * *

The Court's observations would seem to present a veritable paradox of omniscience and nescience. The certificates were issued in 1944, some twelve years ago. Many controversies have been determined longer after-the-fact than that. See e.g., *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289; *Hudson* v. *Texas Gulf Sulphur Co.*, 72 F. 2d 251, *cert.* denied, 293 U.S. 617. Indeed, fifteen and twenty year statutes of limitations are not uncommon. Nor is it *necessarily* so that the passage of time dulls the perception of the relevant considerations. On the contrary, it may sharpen them. Thus, for example, who would deny that the tribunal that retried Joan of Arc in 1455, had a better percep-

tion of the relevant considerations than the court that tried and condemned her in 1431?

In any event, the Court below could not know whether it is "now impossible for any court or administrative agency or official to make a proper determination * * * based on considerations relevant in 1944". In fact, the considerations that were relevant in 1944 are not difficult to ascertain, and for anything that may not be spelled out in contemporary official documents, which are presumably available, there could be no dearth of qualified witnesses to whom 1944 would be but as yesterday. However that may be, the burden of proof would be on the taxpayer. And the taxpayer was entitled to an *opportunity* to improve the record if it could. *Hormel* v. *Helvering,* 312 U.S. 552.

The further reason of the Court below, that by its "acceptance" of the certificates, the taxpayer "forfeited" its right to litigate the question, lends credence to the thought that the view of the Court below as to the impossibility of now applying considerations that were relevant in 1944, may stem from its own failure to remember 1944.

The first certificate was issued in February, 1944. The landings at Anzio and on the Kwajalein Atoll had just been made in January. The battle for Cassino was still raging and the Abbey was bombed on the 15th. Berlin would first be bombed by American planes next month.[5]

The second certificate was issued in June, 1944. The Germans began their "robot" bomb attacks on England during this month; on the 4th Rome fell and

[5] Information Please Almanac, 1953 (Washington *Star* Ed.), pp. 677-679.

the 6th was D-Day. The landing on Guam would not take place until next month, and the landing in Southern France and the liberation of Paris would not be accomplished until August. Okinawa was a year off.[5]

The third certificate was issued in September, 1944. This month saw the battles for Antwerp and Brussels and the landing on Palau. The Japanese surrender was still almost a year ahead.[5]

The fourth certificate was issued in November, 1944. The first landings on the Philippines had just been made the previous month, and it would not be until the following month that a landing would be made on Mindoro. The German counter-offensive and the Battle of the "Bulge" were still a month or more ahead; the landing on Iwo Jima was still three months ahead, and it would not fall for still another month.[5]

The thrust of the argument of the Court below is that the taxpayer and others to whom the Board had issued certificates of necessity limited in percentage, should have declined in the midst of the war to build or otherwise enlarge facilities necessary in the war effort, and should have engaged instead in litigation. The situation is vastly different from that presented in *Callanan Road Improvement Company* v. *United States,* 345 U.S. 507, relied on by the Court below, and more closely resembles those presented in *Union Pacific R.R. Co.* v. *Commission,* 248 U.S. 67, and *Swift, etc. Company* v. *United States,* 111 U.S. 22. For, the courses open to the taxpayer, and to those similarly situated, were to proceed with the facilities necessary to production for the war effort, or to engage in a

[5] Information Please Almanac, 1953 (Washington *Star* Ed.), pp. 677-679.

veritable industrial sit-down, with all of the consequences that that might have entailed in view of the Government's war powers. See, *e.g.*, Act of Oct. 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, Tit. VI, Sec. 601, 602, 56 Stat. 181. That under the circumstances, the result of their having taken the former course[6] should, as the Court below says, be the forfeiture of their right to litigate the question at all would appear to be unconscionable. Particularly would this be so since, as we have seen, mandamus would have been inconclusive and wholly inadequate as a remedy. Further, if the record and the findings of the Tax Court be bare as to facts which would make clear this Hobson's choice, the fault lies elsewhere than with the taxpayer, for no question of waiver, estoppel or collateral attack was raised by the Commissioner in the Tax Court and the case was not tried to that issue. As this Court said in reversing a reversal of a decision of the Board of Tax Appeals in *General Utilities & Operating Co.* v. *Helvering, supra,* 296 U.S. at 206:

> The second ground of objection, although sustained by the court, was not presented to or ruled upon by the Board * * *. Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised.

And, again in *Helvering* v. *Rankin, supra,* 295 U.S. 123, 131, 132:

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[6] It is perhaps significant that *Graphite*, although relating to a certificate issued in 1944, did not arise until 1947, well after the war was over. Presumably, the facilities involved had been acquired by then.

> If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board * * *. And the same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record.

CONCLUSION

The Court of Appeals for the Second Circuit has made an erroneously restrictive interpretation of the rights of taxpayers under Section 124 of the Internal Revenue Code of 1939, in conflict with decisions of the Court of Claims. It has also erroneously interpreted its role upon petitions to review decisions of the Tax Court, and has applied an erroneous principle which "would render orderly administrative procedure impossible". The problems are important ones affecting a large number of currently pending cases. The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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May, 1956

APPENDIX A

THE TAX COURT OF THE UNITED STATES

NATIONAL LEAD COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Docket No. 37694 Filed March 14, 1955.

Opinion

MURDOCK, *Judge:* The Commissioner determined deficiencies as follows:

Year	*Income tax*	*Excess profits tax*
1941	$32,196.29	....
1942	....	$1,426.59
1943	....	2,416,728.13
1944	91,026.81	1,032,315.21

All facts stipulated by the parties are adopted as findings of fact.

* * * * * * * * * *

[Portion of opinion dealing with other issues omitted]

War Facility Amortization

The petitioner acquired, dissolved, and, after June 30, 1944, carried on the business of the American Bearing Corporation. American Bearing had filed applications for certificates of necessity to cover the cost of constructing facilities for the purpose of producing war products. Certificates of necessity respecting those facilities were issued pursuant to section 124 of the Internal Revenue Code, stating that the facilities "are necessary in the interest of national defense during the emergency period, up to 50% [in some 35%] of the cost." The facilities were constructed. The purpose of the certificates was to permit

the petitioner to amortize the cost of the additional facilities over a period of 60 months rather than recover their cost through depreciation deductions over the normal useful lives of the facilities. The petitioner claimed accelerated depreciation for the entire cost of the facilities, but the Commissioner limited the accelerated amortization to the percentages fixed in the certificates of necessity. The petitioner contends that the percentage limitations which the certifying authorities purported to impose must be ignored because they are in violation of the words of and the intention of Congress behind section 124.

Section 124(a) provides that every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis of any emergency facility based upon a period of 60 months. Subsection (e) defines emergency facility as "any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made." Section 124(f)(1) provides that in determining the adjusted basis of an emergency facility "there shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period" under regulations prescribed by the certifying authority with the approval of the President. The certificates in question were for construction after December 31, 1939, and it is conceded that the adjusted basis of that construction is cost.

The petitioner contends that the words "only so much of the" cost refer to construction after December 31, 1939, and that the provision may not be read "the cost attribut-

able to so much of such construction as the certifying authority has certified as necessary in the interest of national defense during the emergency period." It says the certifying authority was to certify facilities, not costs.

The United States Graphite Company sought to compel the certifying authorities to issue certificates which would cover all rather than only part of the cost of facilities which it had constructed. The District Court for the District of Columbia dismissed the complaint. *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944. The Court of Appeals for the District of Columbia affirmed per curiam without opinion, but Judge Wilbur K. Miller filed a dissent in which he discussed the problem. *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, certiorari denied 339 U.S. 904. That taxpayer then sued on a claim for refund of taxes in the Court of Claims on the ground that the percentage of cost limitation on its certificates should be ignored. The Court of Claims held for the taxpayer, and the Government did not seek a writ of certiorari. *Wickes Corp.* v. *United States*, 108 F. Supp. 616.

Judge Miller, in his dissenting opinion referred to above, considered and discussed the words used by Congress, the purpose which it sought to accomplish, and the legislative history of section 124. He stated, "After exhaustive study, I have been able to discover nothing in the language of the Act, or in its legislative history, to indicate that Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized." His interpretation of section 124(f)(1) was that it meant "there shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense." The Court of Claims came to the same conclusion. This Court believes that the reasoning of Judge Miller in his

dissenting opinion and of the Court of Claims is sound and that a correct interpretation of the provisions of section 124 entitles the petitioner in this case to amortize the full cost of the facilities certified over the accelerated period.

Reviewed by the Court.

Decision will be entered under Rule 50.

OPPER, J., dissents on the last issue on the authority of *United States Graphite Co.* v. *Sawyer*, (C.A., D.C. Cir.) 176 F. 2d 868, certiorari denied 339 U.S. 904; and in consonance with the dissenting opinion of Chief Judge Jones in *Ohio Power Co.* v. *United States*, (Ct. Cl., Mar. 1, 1955) 129 F. Supp. 215.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 253—October Term, 1955.

(Argued January 13, 1956 Decided February 14, 1956).

Docket No. 23902

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

NATIONAL LEAD COMPANY, *Respondent*.

Before: CLARK, *Chief Judge*, FRANK and LUMBARD, *Circuit Judges*.

The Commissioner of Internal Revenue petitions for review of a decision of the Tax Court, J. E. Murdock, *Judge*, 23 T. C. 988, holding that the War Production Board had no authority to issue partial certificates of necessity under

§ 124 of the Internal Revenue Code of 1939 and that the taxpayer is entitled to amortization of the entire cost of facilities covered by such certificates. Reversed.

* * * *

LUMBARD, *Circuit Judge:*

This is a petition by the Commissioner for review of a decision by the Tax Court that the taxpayer was entitled to accelerated amortization under § 124 of the Internal Revenue Code of 1939 (as amended) of the entire cost of certain "emergency facilities" constructed during World War II. Section 124(e)(1) provided:

> "As used in this section, the term 'emergency facility' means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made."

Section 124(f)(1) provided for the inclusion in the basis of such an emergency facility of:

> "so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President."

Section 124(f)(3) further provided that:

> "In no event and notwithstanding any of the other provisions of this section, no amortization deduction

shall be allowed in respect of any emergency facility for any taxable year—(C) unless a certificate in respect thereof under paragraph (1) shall have been made (i) prior to the filing of the taxpayer's return for such taxable year, or prior to the making of an election * * * to take the amortization deduction, or (ii) before December 1, 1941, whichever is later * * * "

On December 17, 1943 the President transferred the certifying function to the War Production Board. Executive Order 9406, 8 Fed. Reg. 16955. In 1944 the Board issued to the taxpayer certificates that the facilities now in question "are necessary to the national defense during the emergency period, up to 50% [or in some cases 35%] of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof * * * " It appears that these partial certificates were issued pursuant to a policy of the WPB, adopted toward the end of the war, of certifying only that part of the cost of a facility attributable to excess war costs.

In filing its return for 1944 the taxpayer claimed accelerated amortization only for the percentage of the cost which had been certified, taking ordinary depreciation on the rest. When the Commissioner subsequently asserted a deficiency against the taxpayer for the year 1944 based on other grounds, the taxpayer filed a petition with the Tax Court on November 21, 1951, seeking to have that court review the deficiency. On April 9, 1954 the taxpayer filed an amended petition, claiming for the first time that the WPB had no authority under the statute to certify only excess war costs and that it is entitled to amortization of the entire cost of the facilities. The Tax Court accepted this argument.

The question whether the WPB had authority to issue these partial certificates presents an interesting problem of statutory interpretation on which courts have differed.

Compare *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, aff'd *sub nom. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, cert. denied, 339 U. S. 904, with *Wickes Corp.* v. *United States*, 108 F. Supp. 616 (Ct. Cl. 1952) and *Ohio Power Co.* v. *United States*, 129 F. Supp. 215 (Ct. Cl. 1955), cert. denied 350 U. S. 862. We do not reach this question, however, since we conclude that the taxpayer no longer has any right to raise the issue.

The statutory provisions set out above map out a scheme in which the function of determining whether facilities are necessary to the national defense is entrusted solely to the WPB. The determination whether facilities are necessary is within that agency's discretion and is conclusive so long as the discretion is exercised on the basis of criteria not clearly irrelevant to the statutory purpose. An exercise of the agency's discretion is preliminary to any right to claim accelerated amortization under the Code. The agency's decision ordinarily must take place and be evidenced by a certificate made prior to the time when a tax return for the year in question is filed.

It seems clear that if the WPB had denied a certificate altogether on the ground that the facilities were not necessary to the national defense, there would be no review of that action in any forum. Even if the WPB had refused to exercise its discretion or had based its decision on grounds impermissible under the statute, the failure to issue a certificate could not be challenged in the Tax Court. That Court could not exercise the discretion committed to the WPB under the statute and would therefore be incapable of correcting that agency's error.

But the taxpayer urges that we do not have that problem here because it was implicit even in the issuance of the partial certificates that the WPB had determined the facilities to be necessary to the national defense. We do not agree. The certificates stated only that the facilities were "necessary to the national defense up to 50% [or 35%]

of the cost." This statement did not explicitly say that the facilities were necessary in their entirety. Nor is it implicit in the certificate given that the WPB would have determined the facilities to be necessary if the consequence of that determination had been to allow accelerated amortization of the entire cost. The taxpayer's argument on this point follows that of the Court of Claims in *Wickes Corp.* v. *United States, supra.* The Court there said:

> "The Government suggests that if the Board could not have limited its certificate to 35% of the costs of the facilities, it would, perhaps, not have certified them at all. We have no reason to suppose that the Board, when applied to by the plaintiff for a factual statement as to whether the plaintiff's facilities were, or were not 'necessary in the interest of national defense during the emergency period,' would have said to itself, 'If we make a true statement it will cost the Government X dollars in lost revenue. If it would cost the Government only Y dollars, we would tell the truth. But since it will cost X dollars, we will not tell the truth.'"

The difficulty with this argument is that it assumes the determination of a facility's necessity to the national defense to be a black-or-white proposition ascertainable without reference to the cost to the Government. The determination whether a given facility was "necessary" was a policy question involving the weighing of many factors. Among these were the importance of the facility in the scheme of national defense and the cost of the facility to the Government in lost revenues. The certifying authority had to weigh importance against cost and determine whether that cost could best be expended there or elsewhere, and whether the desired facility could best be obtained through private financing with rapid amortization or through government financing. It is therefore evident that the partial certificates which the Board issued repre-

sented only a determination that the facility was necessary on the assumption that 35% or 50% rapid amortization would be allowed. If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the determination as to necessity might not be the same.

Since the Board never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. Neither that court nor any other court could make the determination of necessity entrusted to the Board. Cf. *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20-21 (1952). The proper way in which to challenge the Board's alleged error was to attack it directly by mandamus in the District of Columbia. The courts of the District have entertained mandamus proceedings for that purpose; *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, D. C. D. C. (1944), aff'd *per curiam sub nom.*, *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (D. C. Cir. 1949), cert. denied, 339 U. S. 904, and the remedy was altogether appropriate. If the petitioner had sought mandamus or appropriate injunctive relief in the District of Columbia and had been successful, a prompt and proper exercise of the Board's discretion would still have been possible. Instead the petitioner chose to accept the benefit of the partial certificate without claiming that it was based on an action outside the authorization of the statute. It is now impossible for any court or administrative agency or official to make a proper determination of necessity based on the considerations relevant in 1944 when the certificate was issued. In any event no one can now summon up or accurately recall the relevant conditions which existed over ten years ago. Under these circumstances the taxpayer has forfeited his right to challenge the Board's action. Cf. *Callanan Road Improvement Co.* v. *United States*, 345 U. S. 507, 512-13 (1953). The language of the Supreme Court in the *Callanan* case is quite pertinent here:

"The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. If the appellant then had taken the position it seeks now, the Commission might conceivably have refused its approval of the transfer. The appellant accepted the transfer with the limitations contained in the certificate. The appellant now will not be heard to say it is entitled to receive more than its transferor had or the certificate transferred gave." 345 U. S. at 513.

The taxpayer here may well have been denied a certificate altogether if it had challenged the Board's action. Having accepted the certificate it is now bound by its limitations.

The decision of the Tax Court is reversed.

APPENDIX C

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(t) [as added by Sec. 301, Second Revenue Act of 1940, c. 757, 54 Stat. 974] *Amortization Deduction.*—The deduction for amortization provided in section 124.

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 124 [as added by Sec. 302, Second Revenue Act of 1940, *supra*]. AMORTIZATION DEDUCTION.

(a) [as amended by Sec. 155(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *General Rule.*—Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis

(for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the period. Such adjusted basis at the end of the month shall be computed without regard to the amortization deduction for such month. The amortization deduction above provided with respect to any month shall, except to the extent provided in subsection (g) of this section, be in lieu of the deduction with respect to such facility for such month provided by section 23(l), relating to exhaustion, wear and tear, and obsolescence. The sixty-month period shall begin as to any emergency facility, at the election of the taxpayer, with the month following the month in which the facility was completed or acquired, or with the succeeding taxable year.

* * * * *

(e) [as amended by Sec. 155(d) of the Revenue Act of 1942, *supra*] *Definitions.*—

(1) *Emergency Facility.*—As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. * * *

* * * * *

(f) [as amended by Sec. 155 (e), Revenue Act of 1942, *supra*] *Determination of Adjusted Basis of Emergency Facility.*—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

* * * * *

(26 U.S.C. 1952 ed., Sec. 124.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.124-6 [as amended by T. D. 5432, 1945 Cum. Bull. 180]. *Adjusted basis of emergency facility.*—

(a) *In general.*—The adjusted basis of an emergency facility for purposes of computing the amortization deduction may differ from what would otherwise constitute the adjusted basis of such emergency facility, in that it shall be the adjusted basis for determining gain (see section 113) and in that it may be only a portion of what would otherwise constitute the adjusted basis. It will be only a portion of such other adjusted basis if only a portion of the basis (unadjusted) is attributable to the certified construction, reconstruction, erection, installation, or acquisition after December 31, 1939. It is therefore necessary first to determine the unadjusted basis of the emergency facility from which the adjusted basis for amortization purposes is derived.

The unadjusted basis for amortization purposes, in cases where the entire construction, reconstruction,

erection, installation, or acquisition takes place after December 31, 1939, and such construction, reconstruction, erection, installation, or acquisition is certified in its entirety by the certifying officer as necessary in the interest of national defense during the emergency period, is the same as the unadjusted basis otherwise determined.

In cases where the certifying officer certifies the entire construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as necessary in the interest of national defense during the emergency period, but only a portion of the construction, reconstruction, erection, installation, or acquisition attributable to the facility takes place after December 31, 1939, the unadjusted basis for the purposes of amortization is so much of the entire unadjusted basis as is attributable to that portion of the construction, reconstruction, erection, installation, or acquisition which took place after December 31, 1939. For example, the X Corporation begins the construction of a facility November 15, 1939, and such facility is completed on April 1, 1940, at a cost of $500,000, of which $300,000 is attributable to construction after December 31, 1939. The certificate of necessity covers the entire construction after December 31, 1939, and the unadjusted basis of the emergency facility for amortization purposes is therefore $300,000. For depreciation of the remaining portion of the cost ($200,000), see section 29.124-7.

If the certifying officer certifies only a portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939, then the unadjusted basis for amortization purposes is limited to the amount attributable to such portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939. Assuming the

same facts as in the example in the preceding paragraph, except that the certificate is to the effect that only 50 percent of the construction after December 31, 1939, is necessary in the interest of national defense during the emergency period, the unadjusted basis for amortization purposes is 50 percent of $300,000, or $150,000.

* * * * *

Appendix D

IN THE UNITED STATES COURT OF CLAIMS

No. 290-55

(Decided April 3, 1956)

ALLEN-BRADLEY COMPANY

v.

THE UNITED STATES

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

MADDEN, *Judge*, delivered the opinion of the court:

This case involves the same question twice previously decided by this court: The *Wickes Corporation* v. *United States*, 123 C. Cls. 741; *The Ohio Power Co.* v. *United States*, 131 C. Cls. 95, certiorari denied, 350 U. S. 862. In accord is *National Lead Co.* v. *Commissioner*, 23 T. C. 988, 1002. The United States Court of Appeals for the Second Circuit reversed the Tax Court, *Commissioner* v. *National Lead Co.*, 1956 CCH, par. 9290.

We have reconsidered our earlier decisions in the light of the contrary decision cited above and, with deference, adhere to the view expressed in them.

The plaintiff's motion for summary judgment is granted, and judgment will be entered for the plaintiff. The amount of recovery will be determined pursuant to Rule 38 (c).

It is so ordered.

LARAMORE, *Judge*; WHITAKER, *Judge*, and LITTLETON, *Judge*, concur.

JONES, *Chief Judge*, dissenting:

I dissent for reasons stated in dissents in the *Wickes* and *Ohio Power Company* cases cited in the majority opinion.

Appendix E

[Caption omitted]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 12th day of March, one thousand nine hundred and fifty six.

Present:

HONORABLE CHARLES E. CLARK, *Chief Judge,*
HONORABLE JEROME N. FRANK,
HONORABLE J. EDWARD LUMBARD, *Circuit Judges.*

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*

v.

NATIONAL LEAD COMPANY, *Respondent.*

A petition for a rehearing having been filed herein by counsel for the Respondent,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. DANIEL FUSARO
Clerk

[Caption omitted]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of February one thousand nine hundred and fifty-six.

Present:

HON. CHARLES E. CLARK, *Chief Judge,*
HON. JEROME N. FRANK,
HON. J. EDWARD LUMBARD, *Circuit Judges.*

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

NATIONAL LEAD COMPANY, *Respondent*.

APPEAL FROM THE TAX COURT OF THE UNITED STATES

This cause came on to be heard on the transcript of record from the Tax Court of the United States , and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed in accordance with the opinion of this Court.

/s/ A. DANIEL FUSARO
Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 124

NATIONAL LEAD COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND REGULATIONS INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT	4
SUMMARY OF ARGUMENT	9
ARGUMENT	
I. A CERTIFICATE OF NECESSITY ISSUED UNDER SECTION 124 OF THE INTERNAL REVENUE CODE OF 1939 IS AN INSTRUMENT OF TAXATION. ITS SOLE LEGAL EFFECT IS TO CONTROL THE AMOUNT OF A TAX DEDUCTION. A PETITION TO THE TAX COURT FOR A REDETERMINATION OF A TAX DEFICIENCY IS THE MEANS PROVIDED BY LAW FOR THE RESOLUTION OF TAX CONTROVERSIES BETWEEN THE COMMISSIONER AND A TAXPAYER. IN SUCH A PROCEEDING A TAXPAYER MAY PROPERLY CHALLENGE BOTH THE EFFECT GIVEN BY THE COMMISSIONER TO A CERTIFICATE OF NECESSITY AND THE AUTHORITY OF THE CERTIFYING AGENCY TO ATTACH TO A CERTIFICATE CONSEQUENCES LESS ADVANTAGEOUS TO THE TAXPAYER THAN THOSE WHICH THE STATUTE PRESCRIBES	12
A. The Commissioner determines the effect to be given a certificate of necessity under section 124 of the Internal Revenue Code of 1939. Such a determination is reviewable in Tax Court proceedings, in the usual way	12
B. Congress has specified remedies which may be pursued by taxpayers who find themselves in controversy with the Commissioner of Internal Revenue. Normally, and especially in tax matters, the specification of a particular remedy or remedies excludes other alternatives. When ordinary remedies are available, extraordinary ones usually are not	15

Page

II. In Any Event, in the Posture of the Case as it Reached the Court Below, Whether the Failure of the Taxpayer to Pursue Some Other Remedy Against the Board Precluded Its Pursuit of This Remedy Against the Commissioner Was Not Properly Before That Court and it "Should Have Passed the Point". The Controversy Should Be Decided on the Merits 22

III. Section 124 of the Internal Revenue Code Did Not Empower the Certifying Agency to Limit a Certificate of Necessity Thereunder So As To Exclude From the Computation of the Adjusted Basis of the Emergency Facility in Respect of the Acquisition, Etc., of Which the Certificate Was Issued the Excess of the War-Time Cost of Such Facility Over Its Estimated Peace-Time Cost, and the Commissioner Should Not Have Given Effect to Such Limitation 25

A. The authority to adopt regulations for the administration of a statute does not extend to the adoption of a regulation which denies a right created by the statute, and a regulation which would do so is void as being in conflict with the statute 25

B. The plain language of section 124 granted the certifying agency no power to limit the statutory consequences of certificates of necessity. The legislative history is clear that the Congress intended to give the certifying agency no such power 30

IV. It Was Error for the Court Below to Disregard an Essential Finding of Fact Made by the Tax Court on the Basis of the Stipulation of the Parties, and to Substitute Therefor Its own Finding. In Any Event, Even on Its Theory of the Case, It Was Error For the Court Below Not to Remand 52

Page

V. The Judgment of the Court of Appeals Should Be Reversed and the Action of the Tax Court Approved 60

Conclusion 61

Appendix 1a

CITATIONS

Cases:

Adams v. *Nagle*, 303 U.S. 532 (1938) 17, 19, 20, 21
Addison v. *Holly Hill Fruit Products*, 322 U.S. 607 (1944) 28
Allen v. *Regents of the University System of Georgia*, 304 U.S. 439 (1938) 17
Allen-Bradley Co. v. *U. S.*, F. Supp. (1956), cert. granted U.S. , 24 L.W. 3336 .....6, 37
American Twist Drill Company v. *Commissioner*, 11 T.C. 200 (1948) 13, 14
Arkansas-Oklahoma Gas Co. v. *Commissioner*, 17 T.C. 1208 (1952) 13, 14
Bingham's Trust v. *Commissioner*, 325 U.S. 365 (1945) 28
Callanan Road Improvement Company v. *United States*, 345 U.S. 507 (1953) 58
Carnegie Center Co. v. *Commissioner*, 22 T.C. 1189 (1954) 23
Cheatham v. *Norvekl*, 92 U.S. 85 (1876) .....,17, 18
Collins v. *Commissioner*, 18 T.C. 99 (1952), aff'd 203 F. (2d) 565 (1954) 23
Dismuke v. *United States*, 297 U.S. 167 (1936) 29
Douglas v. *Noble*, 261 U.S. 165 (1923) 13
Ex parte Baldwin, 291 U.S. 610 (1934) 18, 19
Ex parte Republic of Peru, 318 U.S. 578 (1943) 18
Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17 (1952) 29
General American Tank Car Corporation v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940) 55
General Utilities & Operating Co. v. *Helvering*, 296 U.S. 200 (1935) 23, 24, 59, 60
Graham v. *Dupont*, 262 U.S. 234 (1923) 17
Gray v. *Commissioner*, 16 T.C. 262 (1951) 13
Helvering v. *Janney*, 311 U.S. 189 (1940) 28
Helvering v. *Sabine Transportation Company*, 318 U.S. 306 (1943) 28

Page

Helvering v. *Salvage*, 297 U.S. 106 (1936) 23, 24
Hollister v. *Commissioner*, 44 B.T.A. 851 (1941) 23
Hormel v. *Helvering*, 312 U.S. 552 (1941) 9, 55, 57
Hudson v. *Texas Gulf Sulphur Co.*, 72 F. (2d) 251 (1934), cert. denied, 293 U.S. 617 (1934) 56
Koshland v. *Helvering*, 298 U.S. 441 (1936) 28
Lowe Brothers Co. v. *United States*, 304 U.S. 302 (1938) 13
Manhattan General Equipment Company v. *Commissioner*, 297 U.S. 129 (1936) 28, 29
Medbury v. *United States*, 173 U.S. 492 (1899) ...14, 29
Miller v. *Standard Nut Margarine Co.*, 284 U.S. 498 (1932) 17
Miller v. *United States*, 294 U.S. 435 (1935) 29
National Nickel Co. v. *Nevada Nickel Syndicate*, 112 Fed. 44 (C.A. 9, 1901); cert. denied, 184 U.S. 700 (1902) 23
Nicholl v. *U.S.*, 74 U.S. 122 (1869) 18
Ohio Power Co. v. *U. S.*, 129 F. Supp. 215 (1955), cert. denied, 350 U.S. 862 (1955), reh. denied, 350 U.S. 919 (1955), reh. denied, U.S. , L.W. 3320, denial of reh. vacated, U.S. , 24 L.W. 3337 .....6, 37
Red Canyon Sheep Co. v. *Ickes*, 98 F. (2d) 308 (C.A. D.C., 1938) 17, 20
Reeside v. *Walker*, 11 How. (52 U.S.) 272 (1850) .. 19
Swift, etc. Company v. *United States*, 111 U.S. 22 (1884) 58
Switchmen's Union v. *National Mediation Board*, 320 U.S. 297 (1943), 301 17
Union Pacific R.R. Co. v. *Commission*, 248 U.S. 67 (1918) 58
United States v. *Bethlehem Steel Corp.*, 315 U.S. 289 (1942) 56
United States v. *Duell*, 172 U.S. 576 (1899) 19
United States v. *Hitchcock*, 190 U.S. 316 (1903) 22
United States v. *Knox*, 102 U.S. 425 (1880) 21
United States ex rel. Girard Trust Co. v. *Helvering*, 301 U.S. 540 (1937) 17, 18
United States Graphite Co. v. *Harriman*, 71 F. Supp. 944 (D.C.D.C., 1947), aff'd, *sub. nom. United States Graphite Co.* v. *Sawyer*, 176 F. (2d) 868 (C.A.D.C., 1949), cert. denied, 339 U.S. 904 (1949) 8, 16, 17, 19, 20, 21, 59

Page

United States Graphite Co. v. *Sawyer*, 176 F. (2d) 868 (1949), dissenting opinion of Miller, J. . . 6, 43, 47
Utah Power & Light Co. v. *Pfost*, 286 U.S. 165 (1932) 13
Wellington v. *Commissioner*, 196 F. (2d) 421 (C.A. 7, 1952) 54
Wickes Corp. v. *U. S.*, 108 F. Supp. 616 (1952) . . 6, 7, 21, 29, 37
Wilbur v. *United States ex rel. Kadrie*, 281 U.S. 206 (1930) 19, 20
Wright-Bernet, Inc. v. *Commissioner*, 172 F. (2d) 343 (C.A. 6, 1949) 54

STATUTES:

Act of Oct. 16, 1941, c. 445, 55 Stat. 742 59
Act of March 27, 1942, c. 199, Title VI, Sec. 601, 56 Stat. 181 59
Administrative Procedure Act, Title 5, U.S.C., Sec. 1001 *et seq.* 21, 22
Internal Revenue Code of 1939:
Section 23(l) 35, 37
Section 23(t) 2, 3, 4, 30
Section 124 . . . . . 2, 3, 6, 8, 9, 10, 12, 13, 16, 17, 18, 22, 25, 28, 30, 33, 34, 37, 41, 42, 43, 45, 46, 48, 50, 61
Section 124(a) 2, 4, 30, 31
Section 124(e) 14, 30, 44
Section 124(e)(1) 2, 30, 31, 33, 36
Section 124(f) 4, 25, 31, 45
Section 124(f)(1) 2, 6, 10, 14, 16, 31, 32, 33, 37, 41, 43, 44, 47
Section 124(f)(3) 13, 14
Section 124(h) 31
Section 272 . . . . . 2, 13, 15
Section 272(a) 15
Section 272(e) 16
Section 322(d) 2, 15, 16
Section 1141(a) 54
Internal Revenue Code of 1954:
Section 7482 54
Joint Resolution of October 30, 1941, c. 464, 55 Stat. 757 41

Page

Revenue Act of 1942, Section 155 35
Second Revenue Act of 1940 .....25, 48
Title 28, U.S.C.:
Section 1254(1) 2
Section 1346 13

MISCELLANEOUS:

Cong. Rec., Aug. 29, 1940, p. 11240 42
Cong. Rec., Nov. 14, 1944, pp. A 4729-4731 51
Executive Order 9406, 8 F.R. 16955 25
Executive Order 9841, 12 F.R. 2645 55
Federal Rules of Civil Procedure, Rule 8(c) 23
Hearings, Senate Committee on Finance, on H.R. 10413, 76th Cong., 3d Sess. 37, 38, 39, 40, 41
Hearings, Special Senate Committee Investigating the National Defense Program, 80th Cong., 1st Sess., Part 42 47
H.R. 10413, 76th Cong., 3d Sess. 35
H. Rept. 2894, 76th Cong., 3d Sess. (1940) 33, 34, 36, 41, 50
Information Please Almanac, 1953 (Washington *Star* Ed.) 57, 58
Joint Hearings on Excess Profits Taxation, Amortization, etc., 76th Cong., 3d Sess. 34, 35, 36, 39, 41, 49
S. Rept. 583, 79th Cong., 1st Sess. 51
S. Rept. 2114, 76th Cong., 3d Sess. 35
S. Subcommittee Print No. 12, 78th Cong., 2d Sess. 51, 52
Stimson and Bundy *On Active Service in Peace and War* (1948) 48, 50, 51
Tax Court Rules of Practice, Rule 14 .....8, 23
Treasury Regulations 111, Section 29.124-6 2
United States v. *The Allen-Bradley Co.*, No. 78, October Term, 1956 61
United States v. *Ohio Power Co.*, No. 312, October Term, 1955, No. , October Term, 1956 ..7, 54, 61
1940-2 Cum. Bull. 120, 130 46
1940-2 Cum. Bull. 133, 135 45
1941-2 Cum. Bull. 134, 135 45
1942-2 Cum. Bull. 126, 132 46

IN THE

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OCTOBER TERM, 1956

No. 124

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 3-55) are reported at 23 T.C. 988, 1002. The opinion of the Court of Appeals for the Second Circuit (R. 57-62) is reported at 230 F. (2d) 161.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit, reversing the Tax Court, was entered February 14, 1956 (R. 63). The taxpayer's timely petition for rehearing, filed February 29, 1956, was denied by Order entered March 12, 1956 (R. 63, 64). The petition for a writ of certiorari was filed on May 29, 1956, and was granted on June 11, 1956. U.S. , 100 L. Ed. (Advance p. 879). The jurisdiction of this Court rests on Title 28, U.S.C., Sec. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are sections 23(t), 124(a), 124(e)(1), and 124(f)(1) of the Internal Revenue Code of 1939, and the Regulations involved are Treasury Regulations 111, Section 29.124-6, all of which are set forth in the Appendix, pp. 1a-4a, *infra*.

QUESTIONS PRESENTED

1. Whether in proceedings upon a petition to the Tax Court under section 272 of the Internal Revenue Code of 1939, for a redetermination of a deficiency of tax asserted by the Commissioner and the finding of an overpayment of tax as provided in section 322(d) of the Code, the taxpayer may challenge the Commissioner's computation of the adjusted basis of an emergency facility for the purpose of amortization deductions under sections 23(t) and 124 of the Code, wherein the Commissioner gave effect to the action of the War Production Board in purporting to limit the applicability of the certificate of necessity issued by it under section 124 with respect to the acquisition, etc., of such facility, to only such part of the cost thereof as it deemed to represent the excess of the facility's

war-time cost over its estimated peace-time cost, on the ground that it considered such facility to have post-war use.

2. Whether in such proceedings the taxpayer may properly challenge the authority of the War Production Board under section 124 of the Internal Revenue Code of 1939, to limit, for the purpose of determining the adjusted basis of an emergency facility for use in computing the allowable amortization deduction under sections 23(t) and 124 of the Code, the applicability of the certificate of necessity issued by it under section 124 of the Code with respect to the acquisition, etc., of such facility, to only such part of the cost thereof as it deemed to represent the excess of the facility's war-time cost over its estimated peace-time cost on the ground that it considered such facility as likely to have post-war use.

3. Whether the War Production Board had authority under section 124 of the Internal Revenue Code of 1939 so to limit the applicability of a certificate of necessity issued by it thereunder.

4. Whether, if the War Production Board had no such authority so to limit a certificate of necessity issued under section 124 of the Internal Revenue Code of 1939, the holder of a certificate in terms so limited may amortize during the accelerated statutory period the full cost of the emergency facility in respect of the aequisition, etc., of which the certificate was issued.

5. Whether the Court of Appeals for the Second Circuit erred in disregarding findings of fact by the Tax Court supported by the evidence, and substituting its own findings.

6. Whether the Court of Appeals for the Second Circuit erred in passing upon and in deciding the case on an issue not raised in the Tax Court by the pleadings or otherwise, and which was not considered or passed upon by the Tax Court.

7. Whether, on its theory of the case, the Court of Appeals for the Second Circuit erred in failing to remand the case to the Tax Court for further proceedings.

STATEMENT

The controversy stems from World War II legislation enacted to encourage industrial expansion urgent to the war effort by permitting accelerated amortization deductions, for tax purposes, with respect to new and expanded facilities certified as necessary to the national defense. In the period here pertinent the War Production Board (the "Board") was the certifying agency.

In the proceedings before the Tax Court, the facts were fully stipulated by the parties and the stipulated facts were adopted by the Tax Court as its findings of fact (23 T.C. 988, 989; R. 3-53). The facts, so stipulated and found, may be summarized as follows:

During World War II the petitioner (the "taxpayer") was engaged in the manufacture of engine bearings. Requiring additional facilities for such purpose, the taxpayer applied to the Board for certificates under section 124(f) of the Internal Revenue Code of 1939 that the acquisition, etc., of such facilities was "necessary in the interest of national defense during the emergency period". Such certificates would, under sections 23(t) and 124(a) of the Code, permit the taxpayer, in computing taxable income, to

elect to take amortization deductions spread over a five-year, or shorter period, rather than the ordinary depreciation deductions spread over the normal useful lives of the facilities.

The Board issued four such certificates in respect of the acquisition, etc., of such facilities (R. 5, 6, 8A, 8B). The Board, however, had, late in 1943, adopted a policy designed to limit amortization to the excess of war-time costs over estimated peace-time costs in the case of certified facilities likely to have post-war utility (R. 9-52). Pursuant to that policy, the certificates were framed as follows (R. 8A, 8B):

> It is hereby certified that the facilities * * * are necessary in the interest of national defense during the emergency period, up to 35 per cent of the cost attributable to the construction * * * or acquisition thereof * * *.

In one instance, the percentage was 50 per cent.

When the taxpayer filed its tax returns, it elected to take the amortization deductions. In computing its amortization deductions, the taxpayer gave effect to the percentage of cost limitations contained in the certificates.

Subsequently, the Commissioner asserted deficiencies against the taxpayer on grounds unrelated to the amortization issue here presented, whereupon the taxpayer duly filed its petition to the Tax Court. By amended petition, timely filed, the taxpayer claimed that it had taken amortization deductions only to the percentages of the costs of the certified facilities that were specified by the Board in the certificates, whereas it should have been allowed amortization deductions based upon their full costs (R. 1, 2). The parties

stipulated the exact amount to be amortized in the case of each of the certified facilities "if no such percentage limitation is applicable" (R. 6, 7). The only issue before the Tax Court was whether the Board had authority under section 124 of the Code so to limit certificates of necessity issued thereunder, and the only question passed upon by the Tax Court was the proper construction to be given the pertinent provisions of that section (R. 53-55).

The Tax Court, one judge dissenting, sustained the taxpayer's contention that the Board had no such authority, and in holding that the taxpayer could amortize its full costs, expressed agreement with the majority views of the Court of Claims in *Wickes Corp.* v. *U.S.*, 108 F. Supp. 616 (1952), which that Court has since reiterated in *Ohio Power Co.* v. *U.S.*, 129 F. Supp. 215 (1955), cert. denied 350 U.S. 862 (1955), reh. denied 350 U.S. 919 (1955),[1] and *Allen-Bradley Co.* v. *U.S.*, F. Supp. (1956), cert. granted U.S. , 24 L.W. 3336, and with the dissenting opinion of Judge Miller of the Court of Appeals for the District of Columbia in *United States Graphite Co.* v. *Sawyer*, 176 F. (2d) 868 (1949). The Court of Appeals for the Second Circuit reversed.

The ultimate questions common to this and the *Ohio Power* and *Allen-Bradley* cases are whether the Board's action in limiting its certificates because of probable post-war use was within its authority under section 124(f)(1) properly construed, and, if not, whether a holder of a certificate purporting to be

[1] Motion for leave to file a further petition for rehearing denied U.S. , 24 L.W. 3320, order denying rehearing vacated and petition for rehearing continued U.S. , 24 L.W. 3337.

limited to less than 100 per cent of cost is entitled to amortize the full cost of the property during the accelerated statutory period.

While the Court below said that it did not reach the first of these questions, it in fact proceeded, 230 F. (2d) at 164 (R. 57-62), to analyze the statute and to reach the conclusion that the Board had discretion under the statute to issue certificates with respect to less than 100 per cent of cost. The Court expressed disagreement with the reasoning in *Wickes Corp.* v. *U.S., supra,* and interpreted the certificates as certifying the facilities as being only partially necessary to the national defense—i.e., only to the extent of the specified percentages of their costs—thus completely ignoring the finding of the Tax Court, adopting the stipulation of facts between the parties which the Commissioner summarized in his main brief below, p. 4, as follows:

> All these partial certifications were issued pursuant to the then policy of the War Production Board of * * * certifying only that portion of the cost representing excess war costs where the facility had clear post-war use.[2]

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[2] In its main brief below (p. 1), the taxpayer stated that it took "no issue" with the Commissioner's statement of the case. Copies of the briefs below were lodged with the Clerk simultaneously with the filing of the petition for certiorari. In its reply brief in support of its motion for leave to file a petition for rehearing in *Ohio Power,* No. 312, October Term, 1955, the Government said (p. 3):

> * * * in *National Lead,* both the Government and the taxpayer presented the case to the Court of Appeals as one where the certificates were issued for less than 100 per cent of cost only because of the policy of the administrative agency to reflect post-war use.

See also quotation from p. 18, Commissioner's brief below, set out at p. 25, *infra.*

The Court below answered the second question by holding that the Board's authority to issue a limited certificate could not be challenged in this proceeding, and that the taxpayer's only remedy was mandamus against the Board. For the proposition that such relief was available, the Court cited *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944 (D.C.D.C., 1947), aff'd, *sub. nom. United States Graphite Co.* v. *Sawyer*, 176 F. (2d) 868 (C.A.D.C., 1949), cert. denied, 339 U.S. 904 (1949). The Court below held that by its failure to pursue such remedy at the time of the issuance of the certificates and by its "acceptance" thereof, the taxpayer had "forfeited" its right to challenge the Board's action. 230 F. (2d) at 165 (R. 61, 62).

Whether the authority of the Board to issue a limited certificate "to reflect post-war use" or the propriety of the Commissioner's giving effect to such limitation in his computations could be challenged in this proceeding was not raised by the Commissioner in his answer (R. 3) or otherwise in the Tax Court notwithstanding the provision of Rule 14 of the Tax Court's Rules of Practice that

> the answer shall be so drawn as fully and completely to advise the petitioner and the Court of the nature of the defense.

The taxpayer's right to challenge, in this proceeding, the Board's authority under section 124 so to limit a certificate of necessity issued thereunder was questioned for the first time in the Commissioner's main brief, pp. 41-47, in the Court of Appeals. Upon its petition for rehearing in the Court below, the taxpayer pointed this out, and urged that if the Court should nevertheless adhere to its decision to reverse,

it should nevertheless remand the case to the Tax Court, to afford the taxpayer an opportunity to improve the record on this score, if it could. *Hormel* v. *Helvering*, 312 U.S. 552 (1941). The Court below declined to do so.

SUMMARY OF ARGUMENT

I.

The controversy arises as the result of a determination made by the Commissioner of Internal Revenue under section 124 of the Internal Revenue Code of 1939, and is properly to be resolved upon petition to the Tax Court. That the question involved is the effect to be given by the Commissioner to certificates of necessity issued by the War Production Board under section 124 of the Internal Revenue Code, does not render inapplicable the ordinary procedures provided by the Congress for the resolution of tax controversies. Extraordinary remedies are not usually available when the ordinary remedies are adequate, and when specific remedies are provided other remedies are presumptively excluded. In tax controversies especially, the taxpayer is confined to the remedies specifically provided by the Congress, except in the most unusual of circumstances. Mandamus against the Board would have been wholly inconclusive and inadequate as a remedy.

II.

Waiver, estoppel and collateral attack are affirmative defenses necessary to be pleaded. They were neither pleaded, briefed nor argued by the Commissioner in the Tax Court, and were raised by him for the first time in the Court of Appeals. Accordingly,

these defenses should not have been considered by the Court of Appeals.

III.

Section 124 did not, in terms, authorize the Board or the Commissioner to limit the amount amortizable thereunder with respect to a certified facility to the excess of its war-time cost over its estimated peace-time cost, on the ground that the facility was likely to have post-war utility. The legislative history of section 124 makes it clear that Congress did not intend that any such authority should be vested in either the Board or the Commissioner. On the contrary, it affirmatively appears from the legislative history that section 124 was intended to predetermine the amount amortizable with respect to a facility certified thereunder and to leave no authority or discretion in the Board or the Commissioner to vary the amount so predetermined. The legislative history further shows affirmatively that the language of subsection (f)(1) of section 124, relied on by the Commissioner, was included only for the purpose of authorizing the amortization of post-critical-date costs of the construction or acquisition of a certified facility where its construction or acquisition began before the critical date specified in section 124.

The only authority of the Board under section 124 was to certify, or to refuse to certify, a facility as being "necessary in the interest of national defense", and with respect to a facility so certified section 124 itself determined the amount that could be amortized. Accordingly, any policy or regulation of the Board purporting to limit the amount that could be amortized to less than that predetermined by the statute, and

any such purported limitation on the amortizable amount inserted in a certificate of necessity pursuant thereto, was void as being beyond the authority of the Board. Such a void limitation is ineffective, and binds neither the Commissioner nor the taxpayer.

IV.

The parties stipulated, the Tax Court found, and the case was presented to the Court of Appeals as one where the certificates were issued for less than 100% only because of the policy of the Board to limit amortization to excess war costs where the certified facility was likely to have post-war use. It was error for the Court of Appeals to disregard such stipulation and finding, confirmed by the position taken by both parties before it, and to find, as it did, that the Board "never determined that the facilities in question were necessary to the national defense in their entirety". The finding of fact of the Tax Court was supported by the evidence and as such was conclusive. The Court of Appeals was without power to make any findings of fact.

On its own theory of the case, the Court of Appeals erred in not remanding the cause to the Tax Court to afford the taxpayer an opportunity to improve the record, if it could. Thus, if a judgment in mandamus is a prerequisite to relief the taxpayer seeks, the taxpayer should have been given an opportunity to seek such a judgment against the Secretary of Commerce, the Board's successor. Similarly, if the defenses of waiver, estoppel and collateral attack, which were not pleaded, briefed or argued in the Tax Court nor passed upon by it, were nevertheless properly in the case, the taxpayer should have been given an opportunity to

introduce into the record relevant evidence with respect thereto, of which the record before the Court of Appeals was necessarily barren.

V.

The only questions involved are questions of law, and this Court should reverse the judgment of the Court of Appeals and reinstate the determination of the Tax Court, unless, of course, this Court should accept the theory of the Court below, in which event the case should be remanded to the Tax Court for further proceedings in order to afford the taxpayer an opportunity to improve the record.

ARGUMENT

POINT I

A CERTIFICATE OF NECESSITY ISSUED UNDER SECTION 124 OF THE INTERNAL REVENUE CODE OF 1939 IS AN INSTRUMENT OF TAXATION. ITS SOLE LEGAL EFFECT IS TO CONTROL THE AMOUNT OF A TAX DEDUCTION. A PETITION TO THE TAX COURT FOR A REDETERMINATION OF A TAX DEFICIENCY IS THE MEANS PROVIDED BY LAW FOR THE RESOLUTION OF TAX CONTROVERSIES BETWEEN THE COMMISSIONER AND A TAXPAYER. IN SUCH A PROCEEDING A TAXPAYER MAY PROPERLY CHALLENGE BOTH THE EFFECT GIVEN BY THE COMMISSIONER TO A CERTIFICATE OF NECESSITY AND THE AUTHORITY OF THE CERTIFYING AGENCY TO ATTACH TO A CERTIFICATE CONSEQUENCES LESS ADVANTAGEOUS TO THE TAXPAYER THAN THOSE WHICH THE STATUTE PRESCRIBES.

A. The Commissioner determines the effect to be given a certificate of necessity under section 124 of the Internal Revenue Code of 1939. Such a determination is reviewable in Tax Court proceedings, in the usual way.

Section 124 is an integral part of the Internal Revenue Code and its sole impact is on taxation. While the Commissioner was not the certifying agency, the certificates were addressed to him (R. 5, 6, 8A, 8B), and the consequences of certification are necessarily for him to determine. His determinations,

generally, are subject to redetermination and review, upon proceedings initiated by petition to the Tax Court as provided in section 272 of the Code, or by action for refund in the Court of Claims or a District Court. *Lowe Brothers Co.* v. *United States*, 304 U.S. 302 (1938); Title 28, U.S.C., Sec. 1346. His determinations under section 124 are no exception.

Thus, in *American Twist Drill Company* v. *Commissioner*, 11 T.C. 200 (1948), the certifying agency, acting under section 124, duly issued a certificate of necessity covering the taxpayer's facilities. Nevertheless, the Commissioner refused to give effect to the certificate, holding that under a proper interpretation of the statutory language, i.e., subsection (f)(3) of section 124, construction of the taxpayer's facility had been begun more than six months before it filed its application for a certificate. The Tax Court approved the Commissioner's interpretation. The facts of the case were clear enough; whether the taxpayer's application was timely depended not on the fact-finding process, but on statutory interpretation. In this respect, the certifying agency adopted one view of the law;[3] the Commissioner and the Tax Court adopted another.

In *Arkansas-Oklahoma Gas Co.* v. *Commissioner*, 17 T.C. 1208 (1952), the certifying agency had issued certificates covering certain gas wells, an action which

[3] This is not a matter of record, but must perforce be assumed, for purposeful issuance of an ineffective certificate is not to be presumed. Cf. *Douglas* v. *Noble*, 261 U.S. 165 (1923), at p. 170; *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165 (1932), at p. 190. Certainly the certifying agencies did not deliberately overlook time limits for filing applications. See *Gray* v. *Commissioner*, 16 T.C. 262 (1951).

would have been appropriate and effective only if the statutory definition of the term "emergency facility" contained in subsection (e) of section 124 embraced a gas well. Again, the Commissioner disagreed with the position of the certifying agency, and the Tax Court upheld the Commissioner, holding that the statutory term "facility" could not embrace a gas well. The Court of Appeals for the Eighth Circuit reversed the Tax Court, 201 F. (2d) 98 (1953).

What is involved at bar is the construction, the interpretation, of section 124(f)(1). Can there be any valid reason why the construction adopted by the Commissioner should not be subject to challenge by the taxpayer in this Tax Court proceeding, just as in *American Twist Drill* and *Arkansas-Oklahoma Gas* the taxpayer challenged the Commissioner's interpretations of sections 124(f)(3) and 124(e), respectively? The only difference is that here the Commissioner happens to be in agreement with the construction adopted by the certifying agency, whereas in the cases cited he was not. But even such unanimity among Government agencies affords no basis for contending, much less holding, as did the Court below, that the correctness of their construction is beyond challenge by the taxpayer in the ordinary manner provided by law for the resolution of tax disputes. Cf. *Medbury* v. *United States*, 173 U.S. 492 (1899), esp. pp. 497, 498.

B. Congress has specified remedies which may be pursued by taxpayers who find themselves in controversy with the Commissioner of Internal Revenue. Normally, and especially in tax matters, the specification of a particular remedy or remedies excludes other alternatives. When ordinary remedies are available, extraordinary ones usually are not.

For those who regard themselves aggrieved by actions of the Commissioner of Internal Revenue in respect of their income tax liabilities, Congress has provided two paths of access to the judiciary. One path leads to the Tax Court; the other to the District Courts and the Court of Claims. Broadly speaking, the first permits resolution of the controversy without payment of the tax until the Tax Court, at least, has spoken; the Commissioner asserts a tax deficiency, the taxpayer invokes the jurisdiction of the Tax Court, and the Tax Court then determines the correct liability. The second path may be taken only by those who pay the claimed tax first; they then sue for the return, or refund, of what they claim to have overpaid. Any taxpayer may make his choice of paths to reach his day in court; none may have two days by following both.

When the Commissioner asserted a tax deficiency against the taxpayer here, it chose the Tax Court path. It invoked the jurisdiction conferred and the procedures prescribed by sections 272 and 322(d) of the Internal Revenue Code of 1939.

Section 272 provides, in pertinent part:

> (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of * * * tax * * * , the Commissioner is authorized to send notice of such deficiency to the taxpayer by * * * mail. Within ninety days * * * the taxpayer may file a petition with the

> Tax Court * * * for a redetermination of the deficiency. * * *
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> * * *
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> (e) The Tax Court shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer * * *.
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> * * *

Section 322(d) provides, in pertinent part:

> If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. * * *

Notwithstanding this clear and all-inclusive statutory language, and notwithstanding that Congress made no special provision for direct review of the action of certifying agencies, the Court below holds that the ordinary remedies are not available to a taxpayer when the controversy has its root in the effect to be given a certificate of necessity issued under section 124 and is dependent upon the construction to be given section 124(f)(1). Thus, the Court below said, 230 F. (2d) at 165 (R. 61, 62):

> The proper way in which to challenge the Board's alleged error was to attack it directly by mandamus in the District of Columbia. The courts of the District have entertained mandamus proceedings for that purpose, *United States Graphite Co.*

> v. *Harriman*, * * * 71 F. Supp. 944, aff'd *per curiam, sub nom., United States Graphite Co.* v. *Sawyer*, * * * 176 F. 2d 868, cert. denied, 339 U.S. 904, * * * and the remedy was altogether appropriate.[4]

But the statutory review provisions apply to *all* tax controversies and make no exception for adjustments resulting from construction, or misconstruction, of section 124. Indeed, as this Court said in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943), 301:

> All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced * * *. In such a case the specification of one remedy normally excludes another.

This is especially so in matters involving taxation, and, except only in the most unusual circumstances, this Court has consistently refused to permit the pursuit of unspecified remedies in tax controversies. *Allen* v. *Regents of the University System of Georgia*, 304 U.S. 439 (1938); *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540 (1937); *Graham* v. *Dupont*, 262 U.S. 234 (1923); *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498 (1932); *Cheatham* v.

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[4] In the next sentence the Court below added an application for "appropriate injunctive relief" to mandamus as "the" remedy which the taxpayer might have, nay, alone could have pursued. But the principles applicable in the circumstances to injunctive relief are not different from those governing mandamus. Cf. *Adams* v. *Nagle*, 303 U.S. 532 (1938), esp. p. 542; *Red Canyon Sheep Co.* v. *Ickes*, 98 F. (2d) 308 (C.A. D.C., 1938), esp. p. 322. Accordingly, the two "remedies" prescribed by the Court below may properly be considered as one and the same, and are herein so treated.

Norvekl, 92 U.S. 85 (1876); *Nicholl* v. *U.S.*, 74 U.S. 122 (1869). Thus, in *Cheatham* v. *Norvekl* this Court said, 92 U.S. at p. 88:

> The revenue measures * * * constitute a system which provides for its enforcement by officers commissioned for that purpose. * * * this system * * * provides safeguards of its own against mistake, injustice or oppression, in * * * administration * * *. Such appeals are allowed to specified tribunals as the lawmakers deem expedient. Such remedies, also, for recovering back taxes illegally exacted, as may seem wise, are provided. In these respects, the United States has * * * enacted a system of corrective justice, as well as a system of taxation * * *. That system is intended to be complete.

Section 124 is part and parcel of the Internal Revenue Code, and the system now in effect specifically provides for the resolution of tax controversies through redetermination proceedings on petition to the Tax Court and subsequent judicial review, or by action for refund in the Court of Claims or a District Court. Congress has specified no other remedies as being applicable to section 124, and in the presence of these familiar and accustomed means of securing a review of the Commissioner's determinations, there is a curious inversion inherent in the holding that the availability of the *extraordinary* remedy of mandamus against the Board renders unavailable the *ordinary* remedies prescribed by the Code for the review and correction of the Commissioner's determinations. For, mandamus is "usually denied where other adequate remedy is available". *Ex parte Republic of Peru*, 318 U.S. 578 (1943); *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540 (1937); *Ex parte*

Baldwin, 291 U.S. 610 (1934); *United States* v. *Duell*, 172 U.S. 576 (1899); *Reeside* v. *Walker*, 11 How. (52 U.S.) 272 (1850).

Moreover, the Court below was manifestly in error in holding that mandamus against the Board was available as a remedy. This Court has repeatedly said, as it did in *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206 (1930):

> Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus * * *. But where the duty is not thus plainly prescribed but depends upon a statute * * * the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus. (pp. 218-219)

And, while in such a case, as this Court said in *Adams* v. *Nagle*, 303 U.S. 532 (1938), the administrative officer's

> errors may be subject to subsequent correction, they cannot be enjoined * * *. To hold otherwise would render orderly administrative procedure impossible. (p. 543)

The only means of "subsequent correction" here available were the ordinary remedies of a taxpayer against the Commissioner, which include a petition to the Tax Court.

Nor in *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944, relied on by the Court below, did the District Court for the District of Columbia (or the

Court of Appeals which affirmed *per curiam* on Judge Pine's opinion) misunderstand, as did the Court below, the limited nature of its jurisdiction on mandamus. For, in denying mandamus, Judge Pine said, 71 F. Supp. at 946:

> * * * but in any event, defendant's construction being reasonable, it cannot be set aside by the courts in this proceeding.
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> * * *
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> * * *Thus there is no showing that the exercise of this discretion comes within the exception permitting courts to intervene. *So far as its exercise involves interpretation of the statute* * * *, *the statement made in the preceding paragraph is equally applicable* * * *. (Emphasis supplied.)

Heading the list of the many cases in this Court and the Court of Appeals for the District of Columbia cited by Judge Pine in support of the foregoing are *Adams* v. *Nagle* and *Wilbur* v. *United States ex rel. Kadrie, supra.* And while Judge Pine and the majority of the Court of Appeals may have agreed with the Board's construction of the statute, it is clear that mandamus would equally have been refused if they had disagreed with the Board's interpretation, provided only they found it "reasonably possible". For, if the law be otherwise elsewhere, the Court of Appeals for the District of Columbia has frequently said, as it did in *Red Canyon Sheep Co.* v. *Ickes,* 98 F. (2d) 308 (C.A.D.C., 1938), one of the many authorities to the same effect cited by Judge Pine:

> * * * The rule is, of course, too well settled to require discussion that mandamus will not issue to interfere with the discretion of an administrative officer in construing a statute *even though the court would construe the statute otherwise, pro-*

vided the officer's construction is reasonably possible. (p. 322) (Emphasis supplied.)

Thus, all the *United States Graphite* case stands for is that the Board's construction was not necessarily unreasonable so as to permit judicial interference *in limine* by mandamus. But, the refusal of mandamus does not preclude "subsequent correction". *Adams* v. *Nagle, loc. cit. supra.* The Government itself recognized this when, after the decision in the *United States Graphite* case, the plaintiff, by then merged into the Wickes Corp. under that name, brought an action in the Court of Claims for tax refund, and made the same contention, with success, that it had made without success upon its application for mandamus. *Wickes Corp.* v. *United States,* 108 F. Supp. 616. In the latter case the Government, quite properly, did not plead *rēs adjudicata,* for the only question in the *United States Graphite* case was whether the Board's construction was "reasonably possible", while the issue in the *Wickes* case was whether it was correct. So long as it stands unreversed, the opinion below will lend authority to a heresy which, as this Court has said, "would render orderly administrative procedure impossible". *Adams* v. *Nagle, loc. cit. supra.*[5]

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[5] In the case cited, this Court struck down as erroneous the view taken by a "number of Federal courts" on the basis of broad language used in *United States* v. *Knox,* 102 U.S. 425 (1880), that the remedy for "clear error of law" on the part of a public officer was by direct attack for mandamus or injunctive relief. See *Adams* v. *Nagle,* 303 U.S. 532 (1938), at pp. 541, 542. Moreover, it should be noted that the certificates here involved were applied for and issued between February and November, 1944. Accordingly, even if the Administrative Procedure Act, Title 5, U.S.C., Sec. 1001 *et seq.*, broadened the scope of re-

In *United States* v. *Hitchcock*, 190 U.S. 316 (1903), this Court, in upholding the Court below in refusing to issue a writ of mandamus to the Secretary of the Interior, said:

> Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. * * * The writ never can be used as a substitute for a writ of error. (pp. 324, 325)

Nor, we submit, could it serve as a substitute for the remedies specifically provided by Congress for disputes arising under the Internal Revenue Code. It is therefore submitted that petition to the Tax Court was an appropriate remedy for the taxpayer to pursue to challenge the effect given by the Commissioner to the Board's limited certificates and the Board's authority so to limit its certificates under section 124 of the Internal Revenue Code of 1939.

POINT II

IN ANY EVENT, IN THE POSTURE OF THE CASE AS IT REACHED THE COURT BELOW, WHETHER THE FAILURE OF THE TAXPAYER TO PURSUE SOME OTHER REMEDY AGAINST THE BOARD PRECLUDED ITS PURSUIT OF THIS REMEDY AGAINST THE COMMISSIONER WAS NOT PROPERLY BEFORE THAT COURT AND IT "SHOULD HAVE PASSED THE POINT". THE CONTROVERSY SHOULD BE DECIDED ON THE MERITS.

The decision of the Court below is, in effect, that the taxpayer's proper remedy was a direct attack by mandamus against the Board, that this proceeding constitutes a forbidden collateral attack on the Board's

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view on mandamus or injunction, such remedies were not available to the taxpayer, as the Administrative Procedure Act was not enacted until 1946.

action, and, further, that by reason of its "acceptance" of the certificates and failure to make a direct attack, the taxpayer was estopped, or had waived its right to challenge the Board's authority to issue limited certificates. But neither waiver, estoppel nor collateral attack was pleaded, briefed or argued by the Commissioner in the Tax Court, and no such issue was considered or passed upon there (R. 53-55). The Commissioner raised such issues for the first time in his main brief, pp. 41-47, in the Court of Appeals (see n. 2, p. 7, *supra*). Accordingly, no such issue should have been considered by the Court of Appeals.

Waiver, estoppel and collateral attack are defenses properly to be pleaded affirmatively. Cf. Rule 8(c) of the Federal Rules of Civil Procedure; *National Nickel Co.* v. *Nevada Nickel Syndicate,* 112 Fed. 44 (C.A. 9, 1901), cert. denied 184 U.S. 700 (1902); *Hollister* v. *Commissioner,* 44 B.T.A. 851 (1941); *Collins* v. *Commissioner,* 18 T.C. 99 (1952), aff'd 203 F. (2d) 565 (1954); *Carnegie Center Co.* v. *Commissioner,* 22 T.C. 1189 (1954). This is necessarily so if, as Tax Court Rule 14 requires, "The answer shall be so drawn as fully and completely to advise the petitioner and the Court of the nature of the defense". The Rule of the Tax Court is clear. So are *General Utilities & Operating Co.* v. *Helvering,* 296 U.S. 200 (1935), and *Helvering* v. *Salvage,* 297 U.S. 106 (1936).

In the *General Utilities* case, *supra,* this Court, in reversing a reversal of the Board of Tax Appeals, said, 296 U.S. at 206:

> The second ground * * * although sustained by the court, was not presented to or ruled upon by the Board. The petition for review relied wholly upon the first point; and, in the circumstances, we

> think the court should have considered no other. Always a taxpayer is entitled to know with fair certainty the basis of the claim against him.

In *Helvering* v. *Salvage, supra,* the Commissioner first asserted estoppel in the Court of Appeals upon review of a decision of the Board of Tax Appeals. The Court of Appeals held that the facts did not support the claim of estoppel, and this Court granted certiorari on the Commissioner's petition. In affirming, this Court said, 297 U.S. at 109:

> We find no reason to disagree with the judgment of the court.
>
> The defense of estoppel was not before the Board. Under what we regard as the correct practice * * * the court should have passed the point. * * *

In this case, as in those cited, the Commissioner's answer to the taxpayer's petition to the Tax Court was merely a general denial and the affirmative defense was first urged in the Court of Appeals without its having been pleaded or otherwise raised in, or passed upon by the Tax Court. Accordingly, even assuming for the purpose of the argument that the taxpayer had a remedy by way of mandamus against the Board, the Commissioner's assertion of waiver, estoppel and collateral attack came too late, and the Court below "should have passed the point". It is therefore submitted that the case must be considered, as the Tax Court did, on the merits of the controversy, and without reference to the synthetic issue which the Commissioner first raised in the Court of Appeals.

POINT III

SECTION 124 OF THE INTERNAL REVENUE CODE DID NOT EMPOWER THE CERTIFYING AGENCY TO LIMIT A CERTIFICATE OF NECESSITY THEREUNDER SO AS TO EXCLUDE FROM THE COMPUTATION OF THE ADJUSTED BASIS OF THE EMERGENCY FACILITY IN RESPECT OF THE ACQUISITION, ETC., OF WHICH THE CERTIFICATE WAS ISSUED THE EXCESS OF THE WAR-TIME COST OF SUCH FACILITY OVER ITS ESTIMATED PEACE-TIME COST, AND THE COMMISSIONER SHOULD NOT HAVE GIVEN EFFECT TO SUCH LIMITATION.

A. The authority to adopt regulations for the administration of a statute does not extend to the adoption of a regulation which denies a right created by the statute, and a regulation which would do so is void as being in conflict with the statute.

Section 124(f), as enacted, designated the Secretary of War and the Secretary of the Navy as the certifying agencies thereunder. This they continued to be from the date of enactment of the Second Revenue Act of 1940, which added section 124 to the Internal Revenue Code, until December 17, 1943, when the President, by Executive Order 9406, 8 F.R. 16955, transferred that function, as to all future applications for certificates of necessity, to the Board. Almost immediately, the Board promulgated a new policy, to quote from the Commissioner's main brief below (p. 18), that

> only facilities having no post-war use would thereafter be given 100% certificates. All other facilities would be certified only to the extent of the war-induced cost. Subject to variation in special cases, it was determined that in the normal situation the part of the cost due to abnormal war-time prices was 35%. Accordingly, in the present case, the taxpayer was given three certificates for 35% and one for 50%.

This "policy" appears to have been first set out in writing in a Board memorandum dated February

9, 1944, for circulation both within the Board and among other Government agencies (R. 45-47). In pertinent part it reads (R. 45-47):

* * * *

No facility will be certified unless the war effort would actually be weakened by the lack thereof. * * * The facility cannot be merely desirable, helpful or appropriate. It must be essential * * *.

In determining whether it is to the advantage of the Government that the facilities be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market may be assumed to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, if a facility appears to be of such a type that it would have a reasonably wide market after the war it may generally be assumed that, provided the DPC or other Government agency is willing to purchase it, it would be to the advantage of the Government that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a percentage certificate were issued, such percentage being based, for example, on excess cost attributable to the war.

* * *

Reports must contain an expression of opinion whether it is to the advantage of the Government that the facilities be privately financed * * *. A favorable recommendation must contain a statement that * * * the facilities * * * are so essential to the progress of the war that the reporting agency recommends issuance of a certificate.

Reports must contain a statement of the percentage of cost recommended for certification.

This was followed on March 8, 1944, by a Board circular entitled "Criteria for Preparation of Recommendations for Necessity Certificates * * *" (R. 47-52), reading in part (R. 50):

.02 In the event that amortization should be allowed, determination as to whether it should be 100% or partial should be made as follows:

1. One hundred percent certificate will be given only when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use, and it is not reasonable to assume that they may be useful after the war.

2. Partial certificate representing excess construction or acquisition costs over pre-war costs * will be given when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use and it is reasonable to assume that they may be useful after the war.

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* It is impossible to predict whether post-war costs will be above or below present costs, yet it appears equitable to relate them to pre-war costs. Accordingly, pre-war costs are to be used in determining this partial certificate, and as a general rule pre-war costs are to be considered as being those in effect during the years 1937-1939 inclusive.

Partial certification in accordance with the foregoing was standardized at 35% of war-time costs, but the percentage might be increased in cases where there was definite evidence that 35% would not cover the increase in war-time costs over pre-war costs (R. 16).

Thus, the Board established as its criterion for determining whether a facility was "necessary in the

interest of national defense", that the war effort would actually be weakened by its lack, i.e. its essentiality, as contrasted with its mere desirability, helpfulness or appropriateness to the war effort. Only facilities meeting this test were to be certified. But the Board went a step further: Even if a facility met the requirements for certification, and was in fact certified, the certification would be limited to only a percentage of its cost, conceived to represent the excess of its war-time cost over its estimated pre-war cost, where it was believed that the facility would have post-war use. The express objective was to limit the amount that could be amortized under section 124 (R. 15, 16).

But, if, as we shall contend, the authority of the certifying agency under section 124 extended no further than to determine whether a facility was "necessary in the interest of national defense" (and to issue or refuse to issue its certificate to that effect), and the amortizable amount was predetermined by section 124 itself, as a statutory consequence of certification, as that part of the cost of the certified facility which was attributable to its construction or acquisition after December 31, 1939, it follows that, insofar as they purported to limit the amount to be amortized, the foregoing statements of policy, in application having the effect of a regulation, and any limitations inserted in certificates in accordance therewith, were void as being beyond the authority of the Board. *Bingham's Trust* v. *Commissioner,* 325 U.S. 365 (1945); *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607 (1944); *Helvering* v. *Sabine Transportation Company,* 318 U.S. 306 (1943); *Helvering* v. *Janney,* 311 U.S. 189 (1940); *Koshland* v. *Helvering,* 298 U.S. 441 (1936); *Manhattan General Equipment*

Company v. *Commissioner*, 297 U.S. 129 (1936); *Miller* v. *United States*, 294 U.S. 435 (1935).

This is not a case where an administrative agency, in issuing a license within its discretion, has attached a condition claimed to be beyond its authority, and the licensee seeks to retain the benefits of the license while asking the courts to relieve him of the burdens of the condition. Cf. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17 (1952). Rather, it is a case where an administrative agency and the Commissioner have denied a taxpayer a right to which by statute the taxpayer is entitled on the basis of facts found by the administrative agency. In such a case the right is enforceable notwithstanding such denial. *Dismuke* v. *United States*, 297 U.S. 167 (1936); *Medbury* v. *United States*, 173 U.S. 492. For, as this Court said in *Dismuke* v. *United States*, *supra*, 297 U.S. at 172:

> * * * the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled.

As the Court of Claims said in the *Wickes* case, *supra*, 108 F. Supp. 616 at 619:

> * * * the Board's only function was to determine whether or not facilities answered the description of the statute, i.e., were they "necessary in the interest of national defense during the emergency period." Having so determined, any attempt by the Board to reduce the benefits which Congress granted to the person whose facilities answered the description, was in violation of the statute. * * *

Accordingly, if the Board was without authority to limit the effect of certificates of necessity issued by it upon making the finding prescribed by section 124, neither the Commissioner nor the taxpayer is bound by such limitation, and their full statutory effect must be given to the certificates.

B. The plain language of section 124 granted the certifying agency no power to limit the statutory consequences of certificates of necessity. The legislative history is clear that the Congress intended to give the certifying agency no such power.

Section 23(t) of the Internal Revenue Code allows a taxpayer in computing taxable income to take "the deduction for amortization provided in section 124". Section 124, in turn, opens with the following language:

> (a) *General Rule.* Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the period. * * *

Thus, the amount to be amortized in respect of an "emergency facility", is its "adjusted basis (for determining gain)", which in this case, as in most, is its cost.

Subsection (e)(1) defines an "emergency facility" as follows:

(1) *Emergency Facility.*—As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. * * *

This definition involves three elements: First, "any facility, land, building, machinery, or equipment"; in this case, there were buildings, machinery, and equipment (R. 5, 6). Second, "the construction * * * or acquisition of which was completed after December 31, 1939"; in this case, all construction and acquisition occurred in 1944 (R. 6, 7). Third, "and with respect to which a certificate under subsection (f) has been made"; in this case, such certificates were made (R. 5, 6).

Thus, the requirements of subsections (a) and (e) (1) were fully met, so that the statutory scheme would result, as subsection (a) provides, in the taxpayer being entitled, at its election, to deductions which would amortize the full cost of the facilities over the prescribed period. Subsection (f)(1), however, imposes a limitation on how much of the "adjusted basis (for determining gain)", i.e., how much of the total cost, may be amortized. The meaning of this subsection is the crux of the case. At all material times subsection (f)(1) read as follows:

(f) *Determination of Adjusted Basis of Emergency Facility.*—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjust-

> ed basis as is properly attributable to such construction, reconstruction, erection, installation or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

On analysis, the meaning of the foregoing is clear. It directs that for amortization purposes there be included in the adjusted basis—only so much of what would otherwise constitute the adjusted basis "as is properly attributable to" a certain factor. That factor is: "*such* construction * * * or acquisition after December 31, 1939, as * * * the Secretary * * * has certified as necessary"—such construction as the Secretary has certified; the factor is NOT: *so much of the cost of* such construction as the Secretary has certified, as the Commissioner contended below. Only if these italicized words are read into subsection (f)(1) can it be so construed as to authorize the certifying agency to certify costs, or portions thereof, rather than the construction or acquisition, etc., of facilities.

Subsection (f)(1) thus laid upon the certifying agency the function of determining the necessity, in the interest of national defense, for the "construction * * * or the acquisition", etc., of facilities, but it laid upon the Commissioner the function of determining when the acquisition, etc., occurred. The Commissioner could allow as amortization deductions only so much of the "adjusted basis" as resulted from the construction or acquisition, etc., of emergency facil-

ities taking place after December 31, 1939. To the extent that any part of the "adjusted basis" resulted from earlier construction or acquisition, etc., it was not to be allowed by the Commissioner for amortization purposes.

In this connection, it should be noted that in the definition of "emergency facility" contained in subsection (e)(1) the reference is to construction or acquisition, etc., "*completed* after December 31, 1939", whereas the reference in subsection (f)(1) is to construction or acquisition, etc., after December 31, 1939. The distinction is an obvious one. The construction or acquisition, etc., of a facility might continue over a period of time, and if the construction or acquisition, etc., was completed after December 31, 1939, the facility might qualify as an "emergency facility". On the other hand, its "adjusted basis", i.e., its cost, could be amortized only to the extent that it was attributable to construction or acquisition, etc., which took place after December 31, 1939, and which had been certified as necessary in the interest of national defense.

That this was what Congress intended by the language of subsection (f)(1) is clear from what the House Ways and Means Committee said in reporting the bill (H. Rept. 2894, 76th Cong., 3d Sess. (1940), p. 38):

> * * * Section 124 provides that a corporation shall be allowed a deduction for income and excess-profits tax purposes for the amortization of certain facilities which * * * either the Secretary of War or the Secretary of the Navy certify as necessary in the interest of national defense during the present emergency. Such facilities are

> land, buildings, machinery and equipment or parts thereof acquired after July 10, 1940, or the construction, reconstruction, erection, or installation of which was completed after July 10, 1940. * * * *Although a facility may be an emergency facility even though its construction was begun on or before July* 10, 1940, *only so much of its adjusted basis as is attributable to certified construction taking place after July* 10, 1940, *is subject to amortization. The remainder of the adjusted basis is subject to depreciation.* * * * (Emphasis supplied.)

That the purpose of the language in question was simply to provide for the situation where the "construction * * * or acquisition" of the facility began before the critical date, but was completed thereafter is at once apparent from a comparison of the foregoing with the recommendation of the Subcommittee on Internal Revenue of the House Committee on Ways and Means, with respect to the adoption of an amortization program, dated August 8, 1940, which was the origin of section 124.[6] Thus, the subcommittee's recommendation was:[7]

> Your subcommittee * * * recommends that a corporation be allowed a deduction for income- and excess-profits tax purposes for the amortization of certain facilities which are certified by the Advisory Commission to the Council of National Defense and either the Secretary of War or

[6] See H. Rept. 2894, 76th Cong., 3d Sess., p. 2.

[7] Joint Hearings before the Committee on Ways and Means, House of Representatives, and the Committee on Finance, U.S. Senate, on Excess Profits Taxation, Amortization, and Suspension of Vinson-Trammell Act, 76th Cong., 3d Sess., p. 3. This volume is sometimes hereinafter referred to as "Joint Hearings".

> the Secretary of the Navy as necessary in the interest of national defense during the present emergency. Such facilities are land, buildings, machinery, and equipment, or parts thereof, constructed, reconstructed, erected, installed or acquired after July 10, 1940, and the construction, reconstruction, erection, installation, or acquisition of which was contracted for prior to the termination of the present emergency. It is recommended that the write-off of the cost (adjusted basis for income-tax purposes) of such facilities be permitted to be spread over a period of 60 months, this deduction to be in lieu of the present deduction for exhaustion, wear and tear, and obsolescence provided for in section 23 (l) of the Internal Revenue Code. * * * [8]

The subcommittee's recommendation left unanswered an obvious question: What was to be the status for the purposes of amortization of a facility whose acquisition or construction was begun before the critical date but completed thereafter? Thus, during the course of the hearings on the subcommittee's recom-

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[8] July 10, 1940, was selected as the critical date because on that date the President announced that an amortization provision would be included in the excess profits bill, soon to be introduced. Joint Hearings, n. 7, *supra*, p. 31. At the joint hearings on the subcommittee's recommendations some feeling was expressed that the critical date should be an earlier one. See, *e.g.*, testimony of Under Secretary of the Navy Compton, *id.*, pp. 30-36; of K. T. Norris, *id.*, pp. 203-205; of Prew Savoy, *id.*, pp. 385-386. The bill, as introduced and passed in the House (H.R. 10413, 76th Cong., 3d Sess.) continued the July 10, 1940 date. The Senate, however, substituted January 1, 1940. S. Rept. 2114, 76th Cong., 3d Sess., pp. 8, 21. The Conference Report, S. Rept. 2114, Pt. 2 (76th Cong., 3d Sess.), p. 27, recommended a compromise on June 10, 1940, and the bill was so enacted. By section 155 of the Revenue Act of 1942, the critical date was changed to December 31, 1939, as set out in the text, pp. 31, 32, *supra*.

mendations, R. V. Fletcher, vice president and general counsel of the Association of American Railroads, testified:[9]

> I want to say, however, that this date of July 10, 1940, challenges attention. I have the impression that other witnesses have explained to the committee the importance of careful consideration with respect to that date of July 10, 1940, *so as not to exclude equipment which may have been ordered, or the construction of which may have been begun before that date.* * * * [*O*]*ur contention is that the statute should not be so written as to exclude railroad equipment which may have been contracted for prior to that date, provided it is completed subsequent thereto, provided, of course, the railroad company shall furnish the certificate which the statute no doubt will require.* (Emphasis supplied.)

According to the House Ways and Means Committee Report with respect to the bill:[10]

> The matters included in the bill were referred by your committee to its Subcommittee on Internal Revenue Taxation * * *. On August 8 the subcommittee * * * submitted its recommendations, which formed the basis for full public hearings, held jointly by your committee and the Committee on Finance of the Senate. *The recommendations of the subcommittee* * * * *modified with a view to the relief of certain types of cases disclosed in the hearings, are embodied in the bill.* (Emphasis supplied.)

Quite clearly, the definition of subsection (e)(1) as including facilities whose construction or acquisi-

[9] Joint Hearings, n. 7, *supra*, p. 352.

[10] *Loc. cit. supra*, n. 6.

tion was "completed" after the critical date, and the "so much" clause of subsection (f)(1), referring to "construction * * * or acquisition" after the critical date, were tailored to meet Mr. Fletcher's point, made in the light of the subcommittee's recommendation, that the statute should be so drafted as not to exclude facilities whose construction or acquisition was begun before, but completed after the critical date. The "so much" clause of subsection (f)(1) has no other significance. Certainly it affords no basis for contending, as the Commissioner did below, and as the Government did in the *Wickes, Ohio Power* and *Allen-Bradley* cases, *supra,* that the certifying agency or the Commissioner was authorized to limit the amount to be amortized, to a percentage of the post-critical-date cost of the facility, conceived to represent the excess of war-time costs over pre-war costs where post-war utility might be expected. Neither the language itself nor its origin permits of any such construction. Moreover, the legislative history of section 124 leaves no room for doubt that Congress was perfectly aware of the fact that emergency facilities might have post-war use, and that the amortization provisions of the bill which later became section 124, were so drafted as to preclude post-war utility being taken into account.

Thus, during the course of his testimony before the Senate Finance Committee in support of the bill, Assistant Secretary of the Treasury Sullivan was asked by Senator Vandenberg why the proposed section 124 was needed, in view of the Commissioner's existing authority under section 23(l) of the Internal Revenue Code to allow reasonable depreciation allowances, and suggested that the emergency period might

be considered as the "expected useful life" of a new war facility. The following ensued: [11]

> MR. SULLIVAN. We don't know that that is the expected useful life. There are certain facilities that are being constructed for purely national-defense projects, which may be just as useful after * * * the present emergency is over * * *. * * * Now, under the * * * bill as it comes before you, in order for a manufacturer to secure this special amortization * * * either the Secretary of War or the Secretary of the Navy must * * * certify that this new facility is necessary to national defense.
>
> SENATOR VANDENBERG. Well, then, this new statute is a limitation upon the power you already have?
>
> MR. SULLIVAN. I think not, sir.
>
> SENATOR GEORGE. Just a minute, Mr. Sullivan. You say it is necessary for them to certify that it is necessary to national defense. Do they stop there?
>
> MR. SULLIVAN. I beg your pardon.
>
> SENATOR GEORGE. Is the certificate that is issued on the recommendation of * * * the Secretary of War or Navy, as the case may be, limited to mere certification that the particular facility is necessary for defense, or *do they go further and specify what the depreciation and obsolescence amounts to?*
>
> MR. SULLIVAN. *No; they do not.*
>
> SENATOR GEORGE. *They turn that back to the Treasury?*
>
> MR. SULLIVAN. *No, sir; under the bill automatically the amortization to which they are entitled is 20 percent a year, for 5 years.*
>
> SENATOR GEORGE. Oh, yes; so you are relieved of any responsibility. * * * (Emphasis supplied.)

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[11] Hearings before the Committee on Finance, U.S. Senate, on H.R. 10413, 76th Cong., 3d Sess., pp. 124, 125. This volume is sometimes hereinafter referred to as "Hearings".

Mr. Sullivan was the spokesman for the Treasury, which had worked with the Internal Revenue Taxation subcommittee of the House Ways and Means Committee in the preparation of its recommendations,[12] and subsequently with the Committee's staff in the preparation of the bill.[13] His testimony continued:[14]

> SENATOR GEORGE. * * * You want Congress, then, to say that it is going to be all obsolete * * * in 5 years, but you are not willing to take that responsibility?
>
> MR. SULLIVAN. I don't want Congress to say that at all.
>
> SENATOR GEORGE. That is what you are doing.
>
> MR. SULLIVAN. I beg your pardon, sir. This bill says that in view of the present emergency and our necessity of speeding up these orders, and to encourage them, they must confer this special privilege which cannot be granted under the present law.
>
> SENATOR GEORGE. I take issue with you on it, but that is probably a moot question if you are going to put it in the law that they should be allowed 20 percent. But if it is reasonable to allow depreciation of 20 percent per year on a facility constructed to meet this national emergency, and if it is reasonable to make an allowance for obsolescence, the Treasury has the authority to do it.
>
> MR. SULLIVAN. That is correct, but I think we are using "reasonable" in two different ways, Senator George. * * * Under this law, it may be prudent, it may be the wise thing to do; but I couldn't say to this committee that it is reason-

[12] Joint Hearings, n. 7, *supra*, p. 2.

[13] Hearings, n. 11, *supra*, p. 117.

[14] Hearings, n. 11, *supra*, p. 125.

able to expect that an ultra-modern factory that is to be constructed in the latter part of 1940 or the first part of 1941, built with all of the latest skill and engineering experience, is going to be absolutely useless in 1946. I don't think that is "reasonable," and yet I believe it is desirable and prudent to grant this amortization to those companies that are putting up new facilities for this picture.

SENATOR GEORGE. It may not be reasonable under the amortization section in this bill to reach that conclusion. *It may be that that facility will have a use after the passing of the emergency. That is true. But we are saying here in the law that nevertheless it should be written off.* * * * (Emphasis supplied.)

Senator George pursued the matter further:[15]

SENATOR GEORGE. * * * Now, you are satisfied that the statute is all right and Congress is going to rely on your judgment about it?

MR. SULLIVAN. Yes, sir; we are satisfied that the statute is right.

SENATOR GEORGE. We take it to be your judgment on that question that these added facilities are going to become either what we now call for lack of better term, in "obsolescence" or that the depreciation is going to absorb all the value within the statutory period that follows the issuance of this certificate.

MR. SULLIVAN. Excuse me, Senator George, that is not our judgment. We don't know that they are. We are saying that regardless of whether or not they do, it is prudent and wise to confer this special privilege of assuming that they are going to——

SENATOR GEORGE (interposing). But we are writing it in the law?

MR. SULLIVAN. That is right.

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[15] Hearings, n. 11, *supra*, p. 127.

William S. Knudsen, then a member of the Advisory Commission to the Council of National Defense,[16] testified in similar vein. He said:[17]

> If, at the end of the emergency, it turns out that plant facilities are useful for productive purposes during the emergency period only, the taxpayer is being only fairly dealt with by allowing him to charge off his plant against taxable income during the emergency period. If, however, the plant has productive use after the emergency period is terminated, there is no over-all advantage to the taxpayer in the rapid amortization because during the period after the emergency it will no longer be able to deduct depreciation or amortization on the plant, it having already been completely written off for tax purposes.

In reporting the bill, the House Ways and Means Committee thus summarized section 124 (H. Rept. 2894, 76th Cong., 3d Sess., p. 16):

> Under the bill * * * a corporation is allowed a deduction for income- and excess-profits tax purposes for the amortization of * * * facilities which are certified by * * * either the Secretary of War or the Secretary of the Navy as necessary in the interest of national defense * * *. *The write-off of the cost (adjusted basis for income tax purposes) of such facilities is permitted to be spread over a period of* 60 *months* * * *. (Emphasis supplied).

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[16] The Council of National Defense also worked on the preparation of the bill. Joint Hearings, n. 7, *supra*, p. 2. It was named in the bill as a necessary joint certifying agent with either the Secretary of War or the Secretary of the Navy, and the bill was so passed. By joint resolution of October 30, 1941, c. 464, 55 Stat. 757, subsection (f)(1) of section 124 was amended so as to eliminate the Council's function in this regard.

[17] Hearings, n. 11, *supra*, p. 159.

There is no suggestion whatsoever in the report, which deals with the provisions of section 124 in detail (see pp. 16, 17, 38-41), that the certifying agencies were being given any authority to limit the amortizable amount to less than the cost of a certified facility. If such power were being given to the certifying agencies, that feature would surely have merited comment.

When the bill was being debated on the floor of the House, Representative Boehne of Indiana, a member of the Ways and Means Committee and of its Subcommittee on Internal Revenue Taxation, made the following statement (Cong. Rec., Aug. 29, 1940, p. 11240):

> Now just what do these amortization provisions do? First, they fix the useful life of facilities certified to be necessary in the national defense as 5 years. They remove all problems of proof.
>
> Second, there is no bounty, bonus, or windfall involved. Introducing certainty into the present provision is a desirable improvement. It is designed to give the manufacturer, who is asked to furnish needed new facilities, only a fair break.
>
> Finally, the effect of the clearing-up process is to give a straight-line basis—20 percent a year—* * *.
>
> * * *
>
> In the present national emergency, business is asking no favor of the Government when it merely desires the certainty that private capital expended to construct, or used to acquire, a needed new facility, certified to be necessary for the national defense, may under this law be amortized over a five-year useful life, which is what business is being told is the present program. If the emergency lasts longer * * * no further deductions * * * will be allowed. The proposed amortization provisions will do no more than is fair and just. It will certainly aid national defense.

It is accordingly quite apparent that the legislative history of section 124 confirms that the "so much" clause of subsection (f)(1) has no meaning or purpose other than to permit the amortization of post-critical-date costs of a certified facility whose construction or acquisition was begun before, but completed after, the critical date, and that it was not intended that the certifying agency or the Commissioner should have any authority under section 124 to limit the amortizable amount of the cost of a certified facility because it had or was likely to have post-war use. The legislative history permits of no interpretation of section 124(f)(1) other than that the sole function of the certifying agency was to certify (or refuse to certify) that the "construction * * * or acquisition" of a facility was "necessary in the interest of national defense". This is the plain meaning of section 124, and to read it otherwise requires not only that the legislative history be overlooked, but that the statutory language be distorted. In his persuasive dissent in *United States Graphite Co.* v. *Sawyer*, 176 F. (2d) 868, 870, Judge Miller of the Court of Appeals for the District of Columbia made a most painstaking and compelling analysis of the statutory language, as follows:

> In order to reach the extraordinary conclusion that subsection (f)(1) authorizes the certification as necessary to national defense of less than 100 percent of the cost of a facility otherwise "emergency" in character, the appellee is forced to read subsection (f)(1) as though it provided:
>
> > "There shall be included in amortizable cost only so much of the cost of the facility as * * * the Secretary * * * has certified as necessary in the interest of national defense * * *."

Such reading omits important words in the subsection. It overlooks completely the fact that its language includes the following:

> "* * * as is properly attributable to such construction * * * after December 31, 1939, as * * * the Secretary * * * has certified as necessary in the interest of national defense * * *."

The appellee's construction of subsection (f)(1) as meaning "only so much of the cost as has been certified as necessary in the interest of national defense" does plain violence to the grammatical structure of the statutory sentence, for, as has been said, it leaves out important words. Careful reading of the poorly worded subsection reveals its meaning as

There shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense.

We have seen that subsection (e), in defining the term "emergency facility", expressly excluded anything constructed or acquired before December 31, 1939. That critical date of subsection (e) was carried on into subsection (f)(1), which undertook to govern a situation involving a facility, a part of which was constructed before December 31, 1939, and so could not be amortized, and the other part of which was constructed after that date and so could be certified for amortization. * * * I think subsection (f)(1) clearly means there can be amortized only the "adjusted basis" (which in this case means cost) of that physical portion of a facility which is "emergency" in character in that (a) it had been constructed after December 31, 1939, and (b) it had been properly certified as necessary in the interest of national defense.

The construction now contended for by the Commissioner and the Government would require section 124 to be read as though costs, rather than facilities, were to be certified as necessary in the interest of national defense. But, in a joint notice of procedure to be followed under section 124 issued by the Treasury and the certifying agencies on November 1, 1940, less than a month after its enactment, the term "necessity certificate" was defined as meaning (1940-2 Cum. Bull. 133, 135):

> * * * a certification, issued pursuant to section 124(f) of the Internal Revenue Code, *that the construction or acquisition of the facilities, referred to in the certificate, is necessary in the interest of national defense* during the emergency period. (Emphasis supplied.)

The identical definition is contained in the superseding notice of procedure issued jointly by the Treasury and the certifying agencies (1941-2 Cum. Bull. 134, 135) a year later.

Similarly, in his report to the Secretary of War on the War Department's administration of section 124, Under Secretary Patterson made it clear (R. 25, 26) that certificates of necessity were issued with respect to facilities and not costs, for he thus described the effect of that section:

> Necessity Certificate. For facilities acquired or constructed after June 10, 1940, which the * * * Secretary of War * * * by the issuance of a "Necessity Certificate" certified were necessary in the interest of national defense, an annual deduction of 20 percent of the cost could be taken at the election of the taxpayer. Thus, these facilities could be amortized in five years.

It is significant, moreover, that nowhere in his comprehensive report did Under Secretary Patterson refer to the issuance of certificates calculated to limit the amortizable amount on account of the post-war utility of the certified facility. While the report does refer to partial certification, it does so only in connection with the certification of facilities of a size or capacity greater than was necessary in the interest of national defense, or where the facilities certified were to be used only partially for defense production (R. 34-38). The references to partial certification contained in the Treasury Regulations originally adopted under section 124 (1940-2 Cum. Bull. 120, 130) and in subsequent amendments thereof (1942-2 Cum. Bull. 126, 132; App., pp. 3a-4a, *infra*) clearly relate to partial certification on such basis. Nor do the Treasury Regulations as originally adopted and subsequently amended leave any room for doubt that the Commissioner understood that under section 124 it was the construction or acquisition of facilities, and not the amortizable costs thereof, that the certifying agencies were to certify, for again and again the Regulations refer to the certification of "construction, reconstruction, erection, installation or acquisition" of facilities, but not once do they refer to the certification of the amount of amortizable costs. (See 1940-2 Cum. Bull., 120, 130; 1942-2 Cum. Bull. 126, 132; App., pp. 3a-4a, *infra*.)

It is therefore submitted that section 124 predetermined the amount amortizable with respect to a facility certified as necessary in the interest of national defense, as the cost of construction or acquisition after the critical date; and that neither the certifying agencies nor the Commissioner were empowered under section 124 to reduce the amount to be amortized

on the ground that the certified facility would have post-war use. Accordingly, we submit that the regulations of the Board purporting to limit the amount to be amortized, in the case of a facility having post-war use, to the excess of its war-time cost over pre-war cost, and any restriction inserted in a certificate pursuant thereto, are void as beyond the power of the Board. It follows that amortization of the full statutory amount must be allowed by the Commissioner.

In the light of the manifestly clear purpose and intent on the part of the Congress to predetermine by statute the amount amortizable with respect to a certified facility, the question arises as to how and why the contrary can be urged. To be sure, the language of section 124(f)(1) is in part responsible. See *United States Graphite Company* v. *Sawyer*, 176 F. (2d) 868, 870 (dissenting opinion of Miller, *J.*). But this is not the whole answer. The answer would appear to rest in an attempt to equate post-war hindsight with pre-war foresight.

Employing hindsight, one can be impressed by the circumstance that when the Board adopted its limited amortization policy early in 1944, after the United States had long been at war, industry in large part apparently accepted the policy,[18] or at least made

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[18] The use of "apparently" is advertent. According to Sidney T. Thomas, former Chief, Tax Amortization Section, War Production Board, industry "resented • • • boisterously" the Board's new policy, and a "dog fight" ensued for "2 or 3 months", although facility expansion continued. Hearings, Special Senate Committee Investigating the National Defense Program, 80th Cong., 1st Sess., Part 42, pp. 25554, 25555. Prior to Pearl Harbor, "Manufacturers remained cautious • • •. Neither industry nor

no loud public outcry. One can also be impressed by the circumstance that many emergency facilities turned out to be useful and valuable in the post-war period. The difficulty, however, is that neither the Congress nor industry knew, in the summer and fall of 1940, when section 124 was under consideration and was enacted, what the future held. The purpose and intent of Congress in enacting section 124 must be determined in the light of the foresight that the Congress and industry exercised in 1940, and not in the light of hindsight, which makes all men equally wise.

In enacting section 124 in the fall of 1940, the Congress quite definitely had no intention of providing any bonanza to American industry at the expense of taxpayers generally, for by the very same Second Revenue Act of 1940, which made section 124 part of the Internal Revenue Code, the Congress enacted a heavy excess profits tax. The crucial problem before the Congress was that, following the German "blitzkrieg" conquests of Norway, Denmark, the Netherlands, Belgium and France in the spring of 1940, the defense needs of the nation were so enormous and industry was still so depression-minded that few, if any, were ready to predict that the new facilities which were needed for the defense program would be useful, in the economic sense, once the crisis was over. Certainly, as we have seen, the Treasury was unwilling to commit itself to a prediction.

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government was ready for a thoroughgoing conversion from peace to war * * *." However, "After Pearl Harbor there was never any doubt about the determination of the whole country to produce for war as it had never produced for peace * * *." Stimson and Bundy, *On Active Service in Peace and War* (1948), pp. 380, 381, 491.

A leading spokesman for the executive branch in the development of the World War II amortization program was Secretary of War Henry L. Stimson. At the joint hearings of the House Ways and Means Committee and the Senate Finance Committee on the twin problems of amortization and excess profits taxation, the Secretary stated in broad terms the problem which the executive and legislative branches of the Government then faced:

> Risks are inherent in any business enterprise. Industry may be expected to undertake normal risks. But the risk to industry of undertaking at the request of the Government to expand plant capacity at industry's own expense and of then being left, upon a sudden cessation of the emergency, with these expanded facilities useless, is one that is entitled in my opinion, to special consideration. Under those circumstances, the uncertainty of future taxation as affected by this expanded construction not only, it seems to me, fails to give the special consideration which I have just mentioned, but it rather tends to penalize the situation which the manufacturers confront. It is this element of uncertainty in respect to the industry's right quickly to amortize its investments in an expanded construction program, and also the uncertainty, or I may say the delay, as to the amount and character of taxation which will be levied during the period of the contract, which according to our observations chiefly have prevented the execution of these contracts.[19]

[19] Joint Hearings, n. 7, *supra*, p. 23. Obviously, by "useless" the Secretary meant because of excess capacity, not because of special characteristics which only war could employ. See also testimony of William S. Knudsen, Chairman, Advisory Commission to the Council of National Defense, *id.*, p. 47; Assistant Secretary of the Treasury John L. Sullivan, *id.*, pp. 74, 75; and Assistant Secretary of the Navy Lewis Compton, *id.*, pp. 29, 30.

As stated by the House Ways and Means Committee in reporting out the bill (H. Rept. No. 2894, 76th Cong., 3d Sess., p. 16):

> The extension of existing facilities is a necessary and vital part of the national-defense program. To obtain the needed facilities will require the investment of hundreds of millions of dollars. Your committee has been informed by the Advisory Commission to the Council of National Defense that substantial amounts of private capital will not be invested in the construction of such facilities unless corporations are assured, in view of the fact that such facilities will be of use chiefly only during the period of national emergency, that they will be permitted to amortize the cost thereof over a shorter period than would be permitted under the depreciation provisions of the Internal Revenue Code.

It was in this posture of things, of private enterprise being virtually unwilling in 1940 to gamble on the post-war usefulness of this enormous productive capacity, that the Congress enacted section 124, permitting the rapid amortization of the cost of emergency facilities. To the Congress, to the Administration, and to industry, *at that time,* the five-year rapid write-off of 100% of such facilities appeared only reasonable.[20] It was

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[20] In speaking of 1940, Secretary Stimson later said (Stimson and Bundy, *supra,* n. 18, pp. 352, 353):

> The existing tax laws made no provision for the special circumstances of defense production, in which large plants must be built which would have almost no value after the emergency had ended. No businessman wanted to be saddled with such white elephants, and it was generally agreed that the law must be changed to permit contractors to write off such construction expenses within a five-year period. The administration insisted, however, that such relief must be

not only the American businessman who feared, from the outset of the emergency and throughout the war, a post-war economic collapse or a drifting back into pre-war depression. In an address in Chicago on October 28, 1944, the President (Cong. Rec., Nov. 14, 1944, pp. A 4729-4731) stressed the need for governmental action to continue, in the coming post-war era, the high level of war-time production and employment. So, too, in September 1945, the Senate Committee on Banking and Currency recognized (S. Rept. No. 583, 79th Cong., 1st Sess., p. 2) that:

> * * * within a few months there will be a critical point at which we shall face (1) the danger of boom and bust or (2) the danger of stagnation.

And even earlier, in December 1944, the War Contracts Subcommittee of the Senate Military Affairs Committee had reported (S. Subcommittee Print No. 12, 78th Cong., 2nd Sess., p. 10):

> During the war, we have transformed our economy into an economic skyscraper of breath-taking magnitude. At present, our economy is producing goods and services at the rate of $196,000,000,000 a year. This compares with a gross national product of around $99,000,000,000—or only about half the size—in 1929.
>
> Almost half of the framework supporting this giant structure consists of war contracts. When war contracts are withdrawn, the danger is that the entire edifice will topple over. * * *
>
> Unless an economic substitute is found for war contracts, mass unemployment will become a seri-

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accompanied by a stringent excess-profits tax. * * * Businessmen must be prevented from making excess profits, but they were not going to sign contracts until they had a bill protecting them against large losses * * *.

ous threat and the number of unemployed men and women in this country could easily surpass anything that was dreamed of during the last depression.

Moreover, the risk of post-war deflation was not the only imponderable. There also was the very real risk that there might be no profits out of which to amortize the cost of the installation unless management was successful in its endeavor to shift from the production of plow shares to swords; a necessity certificate was no guarantee of profits. In short, by 1940 foresight, the 100% rapid write-off provisions were not merely a generous give-away. The fortunate economic status of American industry in 1956 is real enough, we trust. But its reality is no proof of the unreality of risks envisaged and accepted in 1940. Nor is the fact that for some the risks taken may have paid off in profits—the very objective of risk-taking—any basis for concluding that there were no risks. But even if it were, even if such profits should now be regarded as mere windfall, the hindsight which sees this is no basis for frustrating the clearly evident and aptly expressed Congressional purpose.

POINT IV

IT WAS ERROR FOR THE COURT BELOW TO DISREGARD AN ESSENTIAL FINDING OF FACT MADE BY THE TAX COURT ON THE BASIS OF THE STIPULATION OF THE PARTIES, AND TO SUBSTITUTE THEREFOR ITS OWN FINDING. IN ANY EVENT, EVEN ON ITS THEORY OF THE CASE, IT WAS ERROR FOR THE COURT BELOW NOT TO REMAND.

The Court below said, 230 F. (2d) at 164 (R. 61):

> * * * It is * * * evident that the partial certificates which the Board issued represented only a determination that the facility was necessary on the assumption that 35 per cent or 50 per cent

rapid amortization would be allowed. If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the determination as to necessity might not be the same.

Since the Board never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. * * *

But, as already noted, the case was tried to the Tax Court on stipulations of facts between the parties, which the Tax Court adopted in their entirety, 23 T.C. 988, 989 (R. 3-7, 8A, 8B; and 53), and included among the stipulations was one which set forth "the reasons for the percentage limitations appearing on the face of the" certificates (R. 7; Comm'r's Br. below, p. 5, n. 3). In his main brief to the Court below, the Commissioner summarized this stipulation, and of necessity, the consequent finding of the Tax Court, as follows (pp. 4-5):

All these partial certifications were issued pursuant to the then policy of the War Production Board of * * * certifying only that portion of the cost representing excess war costs where the facility had clear post-war use. In the ordinary case this excess war cost was considered to be 35%.[21]

With this the taxpayer is in agreement, and so stated in its brief below (p. 1). And, as the Commissioner further said in his brief below (p. 18), the Board's policy was that "only facilities having no post-war use would * * * be given 100% certificates. All other facilities would be certified only to the extent of war-

[21] See n. 2, p. 7, *supra*.

induced cost. * * * Accordingly, in the present case, the taxpayer was given three certificates for 35% and one for 50%."

Indeed, as the Government said in its reply brief submitted to this Court in support of its motion for leave to file a petition for rehearing in *United States* v. *Ohio Power Co.*, No. 312, October Term, 1955 (p. 3):

> And, in *National Lead*, both the Government and the taxpayer presented the case to the Court of Appeals as one where the certificates were issued for less than 100 percent of cost *only because of the policy of the administrative agency to reflect post-war use.* (Emphasis supplied.)

In this case the parties stipulated, the Tax Court found as fact, and both parties took the position, that in each of the Board's certificates, the percentage represented not the *extent* to which the Board determined the certified facility necessary to the war effort, as the Court below presumed to find, but the *estimated excess of war cost over the estimated peace-time cost* of a facility necessary in the national defense, but having post-war utility.

In these circumstances, what warrant can there possibly be for the substitution by the Court below of its own finding of fact for that of the Tax Court? The Court of Appeals may reverse or modify findings only if they are "clearly erroneous" and not supported by the evidence (Sec. 1141(a), I.R.C. '39; Sec. 7482, I.R.C. '54; *Wellington* v. *Commissioner*, 196 F. (2d) 421 (C.A. 7, 1952); and *Wright-Bernet, Inc.* v. *Commissioner*, 172 F. (2d) 343 (C.A. 6, 1949)). But how can the Tax Court's finding in this case be held to be

"clearly erroneous"? It was error, we submit, for the Court below to disregard this finding and substitute its own.

If, notwithstanding the stipulation between the parties, the findings of the Tax Court, and the position taken by both parties before the Court below, there remained any question as to what the Board was doing when it issued the limited certificates, or if the question of the Board's authority was necessarily to be litigated in some other forum before a resolution of the instant tax controversy, then, as the taxpayer asked upon petition for rehearing, the Court below should have remanded the case to the Tax Court to afford the taxpayer an opportunity to improve the record, if it could. *Hormel* v. *Helvering*, 312 U.S. 552 (1941); *General American Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940).

The nature of the Board's action was not in controversy before the Tax Court. It was the subject of stipulation. Any question left open by the stipulation was subject to resolution by the introduction into the record of the relevant files of the Board or by other means. Similarly, if the instant tax controversy could not be resolved absent a judgment in an action between the taxpayer and the Board, the latter's successor, the Secretary of Commerce,[22] is amenable to process, and the taxpayer should have been given an opportunity to correct the record by introducing, if it could, an appropriate judgment.

While in denying the taxpayer's petition for reargument the Court below rendered no opinion, more than

[22] Executive Order 9841, 12 F.R. 2645.

a clue to its reasons for not remanding is apparent from the opinion it did hand down. Thus, the Court below said, 230 F. (2d) 165 (R. 62):

> * * * If the petitioner [*sic*] had sought mandamus or appropriate injunctive relief in the District of Columbia and had been successful, a prompt and proper exercise of the Board's discretion would still have been possible. Instead the petitioner chose to accept the benefit of the partial certificate without claiming that it was based on an action outside the authorization of the statute. It is now impossible for any court or administrative agency or official to make a proper determination of necessity based on the considerations relevant in 1944 when the certificate was issued. In any event no one can now summon up or accurately recall the relevant conditions which existed over ten years ago. Under these circumstances the taxpayer has forfeited his right to challenge the Board's action. * * *

The Court's observations would seem to present a veritable paradox of omniscience and nescience. The certificates were issued in 1944, some twelve years ago. Many controversies have been determined longer after-the-fact than that. See, *e.g.*, *United States* v. *Bethlehem Steel Corp.*, 315 U.S. 289 (1942); *Hudson* v. *Texas Gulf Sulphur Co.*, 72 F. (2d) 251 (1934), cert. denied, 293 U.S. 617 (1934). Indeed, fifteen and twenty year statutes of limitations are not uncommon. Nor is it necessarily so that the passage of time dulls the perception of the relevant considerations. On the contrary, it may sharpen them. Thus, for example, who would deny that the tribunal that retried Joan of Arc in 1455, had a better perception of the relevant considerations than the court that tried and condemned her in 1431?

In any event, the Court below could not know whether it is "now impossible for any court or administrative agency or official to make a proper determination * * * based on considerations relevant in 1944." In fact, the considerations that were relevant in 1944 are not difficult to ascertain, and for anything that may not be spelled out in contemporary official documents, some of which are already in the record and the others of which are presumably available, there would undoubtedly be qualified witnesses to whom 1944 would not be a forgotten era. However that may be, the burden of proof would be on the taxpayer. And the taxpayer was entitled to an *opportunity* to improve the record if it could. *Hormel* v. *Helvering*, 312 U.S. 552 (1941).

The further reason of the Court below, that by its "acceptance" of the certificates, the taxpayer "forfeited" its right to litigate the question, lends credence to the thought that the view of the Court below as to the impossibility of now applying considerations that were relevant in 1944, may stem from its own failure to remember 1944.

The first certificate was issued in February, 1944. The landings at Anzio and on the Kwajalein Atoll had just been made in January. The battle for Cassino was still raging and the Abbey was bombed on the 15th. Berlin would first be bombed by American planes the next month.[23]

The second certificate was issued in June, 1944. The Germans began their "robot" bomb attacks on England during this month; on the 4th Rome fell and the

[23] Information Please Almanac, 1953 (Washington *Star* Ed.), pp. 677-679.

6th was D-Day. The landing on Guam would not take place until the next month, and the landing in Southern France and the liberation of Paris would not be accomplished until August. Okinawa was a year off.[23]

The third certificate was issued in September, 1944. This month saw the battles for Antwerp and Brussels and the landing on Palau. The Japanese surrender was still almost a year ahead.[23]

The fourth certificate was issued in November, 1944. The first landings on the Philippines had just been made the previous month, and it would not be until the following month that a landing would be made on Mindoro. The German counter-offensive and the Battle of the "Bulge" were still a month or more ahead; the landing on Iwo Jima was still three months ahead, and it would not fall for still another month.[23]

The thrust of the argument of the Court below is that the taxpayer and others to whom the Board had issued certificates of necessity limited in percentage, should have declined in the midst of the war to build or otherwise enlarge facilities necessary in the war effort, and should have engaged instead in litigation. The situation is vastly different from that presented in *Callanan Road Improvement Company* v. *United States,* 345 U.S. 507 (1953), relied on by the Court below, and more closely resembles those presented in *Union Pacific R.R. Co.* v. *Commission,* 248 U.S. 67 (1918), and *Swift, etc. Company* v. *United States,* 111 U.S. 22 (1884). The alternatives open to the taxpayer, and to those similarly situated, were to proceed

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[23] Information Please Almanac, 1953 (Washington *Star* Ed.), pp. 677-679.

with the facilities necessary to production for the war effort, or to engage in a veritable industrial sit-down, with all of the consequences that that might have entailed in view of the Government's war powers. See, *e.g.*, Act of Oct. 16, 1941, c. 445, 55 Stat. 742, as amended by the Act of March 27, 1942, c. 199, Title VI, Sec. 601, 56 Stat. 181. That, under the circumstances, the result of their having taken the former course[24] should, as the Court below says, be the forfeiture of their right to litigate the question at all would appear to be unconscionable. Particularly would this be so since, as we have seen, mandamus would have been inconclusive and wholly inadequate as a remedy. Further, if the record and the findings of the Tax Court be bare as to facts which would make clear this Hobson's choice, the fault lies elsewhere than with the taxpayer, for no question of waiver, estoppel or collateral attack was raised by the Commissioner in the Tax Court and the case was not tried to that issue. As this Court said in reversing a reversal of a decision of the Board of Tax Appeals in *General Utilities & Operating Co.* v. *Helvering, supra,* 296 U.S. at 206:

> The second ground of objection, although sustained by the court, was not presented to or ruled upon by the Board * * *. Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised.

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[24] It is perhaps significant that *Graphite*, although relating to a certificate issued in 1944, did not arise until 1947, well after the war was over. Presumably, the facilities involved had been acquired by then.

It is therefore submitted that the Court of Appeals erred in substituting its own finding of fact for a finding of the Tax Court which was fully supported by the evidence, and that, in any event, on its theory of the case, the Court below erred in not remanding to the Tax Court.

POINT V

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED AND THE ACTION OF THE TAX COURT APPROVED.

The findings of fact of the Tax Court are the facts as stipulated by the parties. 23 T.C. 988, 1002 (R. 3-8, 8A, 8B, 53). As such, they are supported by the evidence, and are conclusive. Accordingly, the only questions are questions of law. The Court below erred in disregarding the Tax Court's finding, stipulated by the parties, as to "the reasons for the percentage limitations appearing on the face of the" certificates (R. 7). If there were any possibility of doubt as to the meaning of the Tax Court's finding and the stipulation between the parties in this regard, it was utterly dispelled by the position taken in the Court below by both parties as to such "reasons". As this Court said in *General Utilities & Operating Co.* v. *Helvering*, *supra*, 296 U.S. 200 (1935), 206, 207:

> Here the court undertook to decide a question not properly raised. Also it made an inference of fact directly in conflict with the stipulation of the parties and the findings * * *. To remand the cause for further findings would be futile. The Board could not properly find anything which would assist the Commissioner's cause.
>
> The judgment of the court below must be reversed. The action of the Board of Tax Appeals is approved.

It is therefore submitted that the judgment of the Court of Appeals should be reversed, and the action of the Tax Court approved.

In the event, however, that this Court, while holding in this, or in the *Allen-Bradley* case, No. 78, this term, or in the *Ohio Power* case, No. 312, October Term, 1955, No. ——, this term, that neither the Board nor the Commissioner could lawfully limit the amount amortizable under section 124 with respect to a certified facility on the ground that it would have post-war utility, should nevertheless accept the theory of the Court below, then the case should, of course, be remanded to the Tax Court to afford the taxpayer an opportunity to improve the record.

CONCLUSION

The main issue before this Court—the scope of the statutory authority of the War Production Board—must some day be forthrightly met. To leave it in the limbo to which the Court below consigned it is to invite interminable litigation, in the courts of the District of Columbia, in the Tax Court, in the District Courts, in the Courts of Appeals, and in the Court of Claims. If it is decided that the Board had the authority claimed for it, that ends the matter. If, on the other hand, it is decided that the Board exceeded its authority, taxpayers can be dealt uniform justice only by permitting these tax controversies to be resolved as tax controversies. A holding that the Board exceeded its authority, but that its error cannot be corrected in a tax controversy, would both deny a statutory right and vitiate a statutory remedy. This

Court will not, we submit, sanction such a double frustration of the will of Congress.

Respectfully submitted,

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OCTOBER, 1956

APPENDIX

Statutes

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * *

(t) [as added by Sec. 301, Second Revenue Act of 1940, c. 757, 54 Stat. 974] *Amortization Deduction.*—The deduction for amortization provided in section 124.

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 124 [as added by Sec. 302, Second Revenue Act of 1940, *supra*]. AMORTIZATION DEDUCTION.

(a) [as amended by Sec. 155(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *General Rule.*—Every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis (for determining gain) of any emergency facility (as defined in subsection (e)), based on a period of sixty months. Such amortization deduction shall be an amount, with respect to each month of such period within the taxable year, equal to the adjusted basis of the facility at the end of such month divided by the number of months (including the month for which the deduction is computed) remaining in the period. Such adjusted basis at the end of the month shall be computed without regard to the amortization deduction for such month. The amortization deduction above provided with respect to any month shall, except to the extent provided in subsection (g) of this section, be in lieu of the deduction with respect to such facility for such month provided by section 23(l), relating to exhaustion, wear and tear, and obsolescence. The sixty-month period shall begin as to any emergency

facility, at the election of the taxpayer, with the month following the month in which the facility was completed or acquired, or with the succeeding taxable year.

* * * * *

(e) [as amended by Sec. 155(d) of the Revenue Act of 1942, *supra*] *Definitions.*—

(1) *Emergency Facility.*—As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. * * *

* * * * *

(f) [as amended by Sec. 155(e), Revenue Act of 1942, *supra*] *Determination of Adjusted Basis of Emergency Facility.*—In determining, for the purposes of subsection (a) or subsection (h), the adjusted basis of an emergency facility—

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy, with the approval of the President.

* * * * *

(26 U.S.C. 1952 ed., Sec. 124.)

Regulations

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.124-6 [as amended by T. D. 5432, 1945 Cum. Bull. 180]. *Adjusted basis of emergency facility.*—

(a) *In general.*—The adjusted basis of an emergency facility for purposes of computing the amortization deduction may differ from what would otherwise constitute the adjusted basis of such emergency facility, in that it shall be the adjusted basis for determining gain (see section 113) and in that it may be only a portion of what would otherwise constitute the adjusted basis. It would be only a portion of such other adjusted basis if only a portion of the basis (unadjusted) is attributable to the certified construction, reconstruction, erection, installation, or acquisition after December 31, 1939. It is therefore necessary first to determine the unadjusted basis of the emergency facility from which the adjusted basis for amortization purposes is derived.

The unadjusted basis for amortization purposes, in cases where the entire construction, reconstruction, erection, installation, or acquisition takes place after December 31, 1939, and such construction, reconstruction, erection, installation, or acquisition is certified in its entirety by the certifying officer as necessary in the interest of national defense during the emergency period, is the same as the unadjusted basis otherwise determined.

In cases where the certifying officer certifies the entire construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as necessary in the interest of national defense during the emergency period, but only a portion of the construction, reconstruction, erection, installation, or acquisition attrib-

utable to the facility takes place after December 31, 1939, the unadjusted basis for the purposes of amortization is so much of the entire unadjusted basis as is attributable to that portion of the construction, reconstruction, erection, installation, or acquisition which took place after December 31, 1939. For example, the X Corporation begins the construction of a facility November 15, 1939, and such facility is completed on April 1, 1940, at a cost of $500,000, of which $300,000 is attributable to construction after December 31, 1939. The certificate of necessity covers the entire construction after December 31, 1939, and the unadjusted basis of the emergency facility for amortization purposes is therefore $300,000. For depreciation of the remaining portion of the cost ($200,000), see section 29.124-7.

If the certifying officer certifies only a portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939, then the unadjusted basis for amortization purposes is limited to the amount attributable to such portion of the construction, reconstruction, erection, installation, or acquisition after December 31, 1939. Assuming the same facts as in the example in the preceding paragraph, except that the certificate is to the effect that only 50 percent of the construction after December 31, 1939, is necessary in the interest of national defense during the emergency period, the unadjusted basis for amortization purposes is 50 percent of $300,000, or $150,000.

* * * * * *

INDEX

	Page
Docket entries	2
Exhibit 6-A—Necessity Certificate NC-1893	5
Exhibit 6-B—Necessity Certificate NC-6298	5
Exhibit 6-C—Necessity Certificate NC-6298-A-3	6
Exhibit 6-D—Necessity Certificate NC-6298-A-4	6
Exhibit 6-E—Affidavit of Sidney T. Thomas, Chief, Tax Amortization Branch, Civilian Production Administration	7
Exhibit A—Report of Under Secretary of War Patterson	20
Exhibit F—WPB memorandum on tax amortization	51
Exhibit G—WPB circular on criteria to be used in issuing Necessity Certificates	54
Opinion	61
Decision	64
Petition for review	65

IN THE

United States Court of Appeals For the Second Circuit

No.

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*

v.

NATIONAL LEAD COMPANY, *Respondent*

On Petition for Review of the Decision of the Tax Court of the United States

---

APPENDIX C TO THE PETITIONER'S BRIEF

IN THE TAX COURT OF THE UNITED STATES

Docket No. 37694

[Tr. 1-A]

NATIONAL LEAD COMPANY, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

Docket Entries

1951

Nov. 21—Petitioner received and filed. Taxpayer notified. Fee paid.
Nov. 26—Copy of petition served on General Counsel.
Nov. 21—Request for Circuit hearing in New York City filed by taxpayer. 11/27/51—Granted.

1952

Jan. 18—Motion for extension to 3/10/52 to file answer, filed by General Counsel—Granted.
Mar. 10—Motion for extension to 3/25/52 to file answer, filed by General Counsel—Granted.
Mar. 21—Answer filed by General Counsel.
Mar. 26—Copy of Answer served on Taxpayer—New York, N. Y.

1953

July 28—Hearing set October 19, 1953—New York, N. Y.
July 30—Motion to continue to a later N. Y. calendar, filed by taxpayer. 7/31/53—Granted.
Aug. 19—Hearing set Nov. 30, 1953, New York, N. Y.
Sept. 29—Motion to continue to a later New York calendar filed by petitioner. 9/30/53—Granted.
Dec. 17—Hearing set March 8, 1954, New York, N. Y.

1954

Feb. 18—Joint Motion to continue to or about May 3, 1954, New York, N. Y. filed. 2/19/54—Granted.

Mar. 12—Hearing set June 7, 1954—New York, N. Y.

Apr. 9—Motion for leave to amend petition, amendment to petition lodged, filed by taxpayer. 4/9/54—Granted.

Apr. 12—Copy of motion and amendment served on General Counsel.

May 28—Answer to amendment to petition filed by General Counsel. 6/1/54—Copy served.

June 9 & 10—Hearing had before Judge Murdock on the merits. Entry of appearance of Floyd F. Toomey, Stipulation of Facts #1 with Exhibits 1-A thru 1-C, Stipulation of Facts #2 with Exhibits 2-1-A thru 2-1-M, 2-11-A thru 2-11-Q, 2-111-A thru 2-111-V and 2-IV-A thru 2-IV-E, Stipulation of Facts #3 with exhibits 3-A thru 3-EE, Stipulation of Facts #3A.

June 9 & 10—Stipulation of Facts #4, Stipulation of Facts #5 with Exhibits #5-A thru 5-H, Stipulation of Facts #5-A, Stipulation of Facts #6 with Exhibits 6-A thru 6-E filed. Briefs due 9/9/54; Replies due 9/29/54.

June 30—Transcript of Hearing 6/9/54—filed.

June 30—Transcript of Hearing 6/10/54—filed.

Sept. 1—Joint motion for extension to Oct. 11, 1954 to file briefs filed. 9/7/54—Granted.

Oct. 11—Joint motion for extension to Nov. 10, 1954 to file briefs filed. 10/11/54—Granted.

Nov. 8—Brief filed by taxpayer (P) 11/12/54 copy served.

Nov. 10—Brief filed by General Counsel.

Nov. 26—Joint motion for extension to Dec. 30, 1954 to file reply brief, filed. 12/2/54—Granted.

Dec. 30—Reply Brief filed by General Counsel. (Respondent served Petitioner)

Dec. 30—Reply Brief filed by taxpayer. (P) Copy served.

1955

Mar. 14—Opinion filed, Judge Murdock, Decision will be entered under Rule 50. Copy served.

Apr. 28—Stipulation of Fact that petitioner's tax returns were made to (then) Collector of Internal Revenue, 2nd Dist. of N. Y. filed.

June 8—Agreed Computation filed.

June 17—Decision entered, Judge Murdock, Div. 3.

Sept. 14—Petition for Review by U. S. Court of Appeals, 2nd. Circuit filed by General Counsel.

Sept. 14—Notice of filing petition for review, mailed to Karl Riemer, Esq. filed.

Sept. 20—Proof of Service of petition for Review, filed. (Karl Riemer)

Sept. 20—Proof of Service of petition for review, filed (Nat'l Lead Co.)

Oct. 11 —Cross-Petition for Review by U. S. Court of Appeals for the Second Circuit filed by taxpayer.

Oct. 11—Proof of Service filed.

Oct. 12—Motion for extension to Dec. 13, 1955 for filing the record and docketing the appeal, filed by General Counsel.

Oct. 13—Order extending time to Dec. 13, 1955 for filing the record and docketing the appeal, entered.

Nov. 14—Stipulation to dismiss cross-petition for review, filed.

Nov. 16—Order dismissing petition for review, entered. (Taxpayer's Petition)

Nov. 17—Stipulation for contents of record on review and omissions therefrom, filed.

Exhibit 6-A

FORM GA-1279 (1-4-44) R	UNITED STATES OF AMERICA WAR PRODUCTION BOARD	DATE	NC 1893

NECESSITY CERTIFICATE

To The Commissioner of Internal Revenue:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

NAME AND ADDRESS OF APPLICANT, (Street, City, Zone, State)

American Bearing Corporation
429 S. Harding Avenue
Indianapolis, Indiana

IT IS HEREBY CERTIFIED that the facilities described in the attached Appendix A (consisting of three pages) are necessary in the interest of national defense during the emergency period, up to 50 % of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, and that the application for this Certificate was filed on February 3, 1944.

WAR PRODUCTION BOARD

By [signature]

FEB -5 1944

[illegible]

SIGNATURE

(1943)—War Board 9234—p. 1

Exhibit 6-B

FORM GA-1239 (1-4-44) R	UNITED STATES OF AMERICA WAR PRODUCTION BOARD	DATE	BC - 6298

NECESSITY CERTIFICATE

To The Commissioner of Internal Revenue:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

NAME AND ADDRESS OF APPLICANT (Street, City, Zone, State)

American Bearing Corporation
429 So. Harding Street
Indianapolis 7, Indiana

IT IS HEREBY CERTIFIED that the facilities described in the attached Appendix A (consisting of 2 pages X X X X X X X X X X X X X X) are necessary in the interest of national defense during the emergency period, up to 25 % of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, and that the application for this Certificate was filed on June 27, 1944.

WAR PRODUCTION BOARD

BY [signature]

JUN 30 1944

(1940 — War Board 0234 — p 1)

Exhibit 6-C

FORM GA-1239 (10-11-44) R	UNITED STATES OF AMERICA WAR PRODUCTION BOARD NECESSITY CERTIFICATE	DATE Sept. 26, 1944	NC - 6298-A-3

To The Commissioner of Internal Revenue:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

NAME AND ADDRESS OF APPLICANT (Street, City, Zone, State)

American Bearing Corporation
429 S. Harding Street
Indianapolis 7, Ind.

IT IS HEREBY CERTIFIED that the facilities described in the attached Appendix A (consisting of 2 pages XXXXXXXXXXXXXXXXXX) are necessary in the interest of national defense during the emergency period, up to 35 % of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, to the extent that such construction, reconstruction, erection or installation is begun or such acquisition is effected within 60 days after the issuance date of this certificate.

WAR PRODUCTION BOARD

BY [signature]

RECORDING SECRETARY

SIGNATURE

3-48003 2

Exhibit 6-D

FORM GA-1239 (10-11-44) R	UNITED STATES OF AMERICA WAR PRODUCTION BOARD	DATE	NC - 6298-A-4

NECESSITY CERTIFICATE

To The Commissioner of Internal Revenue:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

NAME AND ADDRESS OF APPLICANT (Street, City, Zone, State)

American Bearing Corporation
429 S. Harding Street
Indianapolis, 7, Indiana

IT IS HEREBY CERTIFIED that the facilities described in the attached Appendix A (consisting of 2 pages XXXXXXXXXXXXXXXXXX) are necessary in the interest of national defense during the emergency period, up to 35% of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, to the extent that such construction, reconstruction, erection or installation is begun or such acquisition is effected within 60 days after the issuance date of this certificate.

WAR PRODUCTION BOARD
By [signature]
RECORDING SECRETARY

NOV 2 1944

S-69868 2

[Appendices describing facilities are omitted]

Exhibit 6-E

Filed Dec 30 1946

AFFIDAVIT OF SIDNEY T. THOMAS, CHIEF, TAX AMORTIZATION BRANCH, CIVILIAN PRODUCTION ADMINISTRATION

CITY OF WASHINGTON, DISTRICT OF COLUMBIA, SS:

I, Sidney T. Thomas, being duly sworn, do hereby depose and say:

1. I am the duly appointed Chief of the Tax Amortization Branch of the Civilian Production Administration and prior to that was Acting Chief of said branch of the War Production Board since December 26, 1943.

2. In that position, I have been delegated authority by the Chairman of the War Production Board and his successor the Administrator of the Civilian Production Administration,[1] to consider applications for Necessity Certificates and to issue Necessity Certificates or to disapprove of such applications, in accordwith the policies and regulations established by the Chairman of the War Production Board and the Administrator of the Civilian Production Administration under Section 124 of the Internal Revenue Code.

3. The statements made in this affidavit are based upon information received by me in my official capacity and which I believe to be true and accurate.

4. In order to give the necessary background of the tax amortization program, I quote from the Report of the then Under Secretary of War Robert P. Patterson to the Secretary of War dated 10 March 1945, copy

[1] The functions of the War Production Board were transferred to the Civilian Production Administration by Executive Order 9638 dated October 4, 1945.

of which is attached marked Exhibit A. As stated by Under Secretary of War Patterson:

At the beginning of our rearmament program in 1940, industry was hesitant to accept contracts whose completion would require the use of private capital for creation of new facilities. Since we were not at war, and the future of the defense program hinged upon events and policies which could not be predicted with any certainty, industry could not ignore the possibility that conversions and expansions undertaken for defense purposes might not be kept in operation long enough to repay their cost, if the usual rate of amortization was employed. The hesitancy which this provoked was increased by two other factors, (1) the stringency with which the existing revenue laws treated facility costs in computing income, and (2) the prospect of greatly increased rates of taxation. Not only were these rates likely to increase, but no one could say exactly when or by how much.

In the light of these uncertainties, the hesitancy of industry was understandable. At the same time, speedy plant expansion and conversion were vital military necessities. Something had to be done to reconcile financial prudence with urgent military need. To bring this about some assurance was needed that, in computing income, special allowance would be made for the possibility that war facilities would become useless before the expiration of their normal life. In view of the probability that earnings would be high for a brief period, and then might drop, it seemed only fair to permit the cost of the facilities to be taken out of the high income during the period in which it was being earned.

In addition, there was every indication that Congress would provide a very high excess profits tax to

cover the period of maximum earnings. This tax policy threatened to prevent a company accumulating enough surplus to absorb the portion of the cost of the facilities which remained unabsorbed at the cessation of war production. Even patriotism could not reasonably be expected to include a contractor to court bankruptcy by tying up a large portion of his capital, much of it borrowed, in factory expansion which might suddeny become valueless. Some means had to be devised to allow the return of the cost of their expansion to the contractor while the expanded facilities were being used in war production.

On May 26, 1940, the President called upon private industry for help in rearmament and recognized that, in view of a possible curtailment of order within a year or two, private industry could not be expected to assume all the financial risks of this expansion. In a report of the Committee on Ways and Means of the House of Representatives on June 10, 1940, (Report No. 2491) made in connection with a revenue bill then under consideration, it was stated that proposals had been made to provide special amortization for national defense industries and to impose excess profits tax. The two proposals were to be considered as interdependent. A press release from the White House on July 10, 1940 announced that it had been decided to incorporate in the excess profits tax bill, which was soon to be introduced, a provision for amortization over a five-year period of national defense.

5. The passage of Section 124 of the Internal Revenue Code and its subsequent amendments then followed.

6. Many of the procedures and policies followed by the War Production Board in administering Section 124 were the necessary outgrowths of those estab-

lished by the War and Navy Department during the primary administration of the law prior to December 17, 1943.

7. As required by the statute, the Secretaries of War and Navy issued from time to time regulations governing the issuance of Necessity Certificates. First, in time, was the regulation of May 22, 1942 approved by the President and later amended with the approval of the President on February 1, 1943. A copy of the regulation, as amended, is attached and marked Exhibit B.

8. During this period the purpose of the program was to get the plants built and devoted to war work in view of the great shortage of capital equipment to meet war needs. The guides to be followed in determining the issuance of Necessity Certificates included such factors as the type of supplies to be manufactured, the time of acquisition, whether in fact a definite shortage of capacity in plant existed, the purpose of the acquisition and related matters.

9. By the spring of 1943, as stated by the Under Secretary of War Patterson in his report:

It was becoming apparent that the chief limiting factor in the production of war supplies no longer was facility capacity but materials and manpower. The search for maximum war production now required, not an encouragement of facility expansion, but a curbing of it. On May 12, 1943 the War Production Board publicly announced:

With the exception of certain special programs, some special machinery, and further expansion of raw materials production, the United States at last has the machine tools and the capital equipment it needs to build production to defeat the Axis. For the first time

in its history, the nation now has a physical plant adequate to make the maximum use of its resources in men, skill and materials.

An examination of our production effort up to that point revealed that the nation had devoted almost as much effort to the construction of necessary facilities as it had to the actual production of arms and munitions. Thereafter, it was believed, the greater part of the plants and materials which had been used so far in making machinery and equipment ought to be devoted directly to manufacturing planes, guns, tanks, and other munitions. It was suggested, therefore, that steps be taken either to restrict certification very rigidly, or to terminate it entirely.

10. We were entering into a phase of total warfare under which materials and manpower were short and every facet of our economy was being affected. It would seem that no investment of capital should be made and no one should be allowed to use materials unless the facilities involved were clearly "necessary in the interest of national defense". If mass certifications were granted, the resultant loss of revenue to the Treasury would be appreciable. With increased tax rates, Necessity Certificates had become more attractive as a method of financing than they were when the statute was originally enacted. The cost to the Government of certified facilities was higher through a sacrifice in tax revenues. For these reasons, among others, the entire matter was re-examined with a view to determining whether the Act should be terminated so far as giving further amortization rights to any facilities or whether any investment of private capital should be entitled to emergency amortization.

11. On June 25, 1943, the matter was submitted to the Office of War Mobilization, with a suggestion of

possible alternatives. The Director of War Mobilization, after considering the matter, directed the War and Navy Departments to amend the regulations governing the issuance of necessity certificates. It was suggested that the issuance of certificates for facilities for a military or naval supply might still be authorized in exceptional and limited cases where the need had been determined before expansion.

12. Therefore, an amendment to the existing regulations was submitted to the President for approval. This amendment to the Regulations was approved by the President on October 5, 1943 (8 F. R. 13824). A copy is attached and marked Exhibit C. Out of fairness to the applicant who had already spent his money or who had previously filed his application, the discontinuance was not to apply retroactively.

The amendment provided that a facility "shall not be deemed necessary" unless either Secretary, in exceptional cases, has determined prior to the beginning of construction or the date of acquisition that there is a shortage of facilities for a supply required for military or naval use and that it is to the advantage of the Government that additional facilities for such supply be privately financed. As has been indicated, the clear intention was to obtain substantial termination of the issuance of certificates. For that reason, the press release issued on the date when the President approved the regulations stated that the amendment "indicates virtual termination of the tax amortization privilege". (See NY Times, Oct. 10, 1943, Sec. 5, P. 59, Col. 1; NY Times, Dec. 19, 1943, Sec. 5, P. 10S, Col. 5)

13. In addition to the extensive notoriety of the amendment given in the press of the country, and its publication in the Federal Register, a copy of this

amendment was sent to all taxpayers, including the plaintiff United States Graphite Company, who had previously filed application for necessity certificates. Copy of this notice is attached and marked Exhibit D.

14. On December 17, 1943, the President, by Executive Order, (No. 9406, 8 F. R. 16955) transferred the function of issuing necessity certificates in all future cases from the Secretary of War and the Secretary of the Navy to the Chairman of the War Production Board. The War and Navy Departments, however, were to decide the applications then on file. The principle of predetermination and the principle of considering what was to the advantage of the Government as a financial matter were retained in the transfer. On the same date, the President approved the amended regulations governing the issuance of necessity certificates prescribed by the Chairman of the War Production Board. Copies of these regulations are attached hereto and marked Exhibit E.

15. The new regulations adopting the principles outlined in the regulations of the Secretaries of War and Navy recognized the complete tie-in between the actions taken in granting priorities or authorization to construct with respect to facilities and the financial matters to be decided with respect to the issuance of necessity certificates. Regulation (3)(c)(v) required that an application for necessity certificate be filed concurrently with the request for priority assistance or specific authorization.

16. With respect to future certifications, the Executive Order specified that necessity certificates should not be issued unless prior to the beginning of construction or date of acquisition, the Chairman of the War Production Board determined (1) that the facilities were clearly necessary for the war effort, and (2) that

it was to the advantage of the Government that the facilities be privately financed.

17. It should be noted in this connection that the granting of priorities called for different considerations and the application of different standards than those entering into the issuance of necessity certificates. The power to grant priorities was derived from an entirely separate law (The Second War Power Act) and was administered under different Executive Orders No. 9040 (7 F. R. 527); No. 9125 (7 F. R. 2719); No. 9638 (10 F. R. 12591). In point of fact, the preference ratings issued to United States Graphite Company in this case for this equipment were AA-3. There were several priorities higher than this that could have been granted.

18. There was a tremendous advantage to be gained by any private manufacturer who could build up a postwar plant at the expense of wartime income. A memorandum prepared by the Tax Amortization Branch of the War Production Board outlining the factors to be considered in predetermination, whether it was to the advantage of the Government that the facilities be privately financed, is attached and marked Exhibit F. The standards applied in the partial certification of facilities were these:

1. Postwar utility

A. Under War Production Board policy, facilities having presumptive postwar utility receive partial certification only. This policy arises out of section 3-b-2 of Executive Order 9406 which requires a finding: "that it is to the advantage of the Government that such additional facilities be privately financed." The section was designed to protect the financial interest of all of the taxpayers in a certified facility. The

Government, which represents all the taxpayers, may eventually pay as much as 85 per cent of the cost of a fully certified facility, whereas if the facility were Government owned, the Government would be able, by sale or other disposition after the war, to recoup a part of its cost. Thus, the facility would have been made available for the war effort at a probable saving as compared with full certification. The saving would result no matter who is able to use the facility after the war, so that postwar utility should not be considered as limited to utility in the hands of any particular applicant.

B. Postwar utility is not restricted to usefulness to the applicant himself in his regular business, as a facility is considered to have presumptive postwar utility if it may reasonably be considered useful to anyone after the war. For example, a "standard machine tool" is always considered to have postwar utility because it can be used to produce many items other than the subject war product for which the applicant needs it. On the other hand, a "special machine tool" which can be used only to make a specific war product having no civilian use would be considered as having little or no presumptive postwar utility. Again, permanent structures, installations, and building additions are practically always to be considered as having presumptive postwar utility, while a strictly temporary structure of such construction that it could not be useful for many years might be considered to have little or no presumptive postwar utility.

II. Purpose of partial certification

Partial certification is intended to cover a liberal allowance for the excess cost of wartime acquisition or construction as compared with normal or prewar (1937-1939) costs.

III. Standard 35 per cent partial certification

A. After surveys of current and prewar costs of many types of facilities, partial certification has been standardized at 35 per cent of current costs.

B. Departure from the standard 35 per cent partial certification for facilities having presumptive postwar utility would require definite evidence that 35 per cent does not cover the increase in current costs above prewar costs. For example, if it be established that a facility currently costing $100,000 could have been built in the period 1937-39 for $40,000, a recommendation of 60 per cent certification would be in order.

IV. Mixed percentage certification

There is no objection to recommending 100 per cent certification of certain facilities and denial or partial certification of certain other facilities covered by the same application, or a mixture of all three recommendations, as the facts may warrant. Such mixed percentage recommendations should clearly indicate which recommendation applies to each portion of the application, and the reasons therefor.

V. Recommendations

All recommendations should specify whether or not the facility is considered to have postwar utility. If special circumstances appear to warrant certification in excess of the standard 35 percent, the facts should be clearly stated to support an appropriate recommendation.

19. There is attached hereto a copy of the circular dated March 8, 1944 approved by J. A. Krug, then Vice Chairman of the War Production Board, setting forth criteria for preparation of recommendations for

necessity certificates. A copy is attached and marked Exhibit G.

20. Under the above established procedures, the application of the United States Graphite Company for a necessity certificate to amortize its machinery was considered. This application was filed on May 29, 1944 with the Tax Amortization Branch of the War Production Board. This application was considered independently of the issuance of a necessity certificate for the plant. The necessity for amortization of the machinery was determined upon the facts and circumstances then existing at the time of the application. The bulk of the machinery in question consisted of standard machine tools in general use in industry such as internal grinders, drill presses, surface grinders, hydraulic grinders and related tools. It was our opinion that these items were likely to have a broad market and general value at the end of the war and be of use for normal peacetime production.

21. Applying the general principles and policies outlined in the regulations, we arrived at the determination that only 35 per cent of the cost of these items should be amortized during the emergency period. Accordingly, a necessity certificate was issued for the items acquired after the time of our determination, July 17, 1944, covering 35 per cent of the cost. Items acquired before that date were denied a necessity certificate for the reason that the application was not filed at the time required by the regulation.

22. The scope of this program is indicated by the fact that total dollar value of necessity certificates issued since the inception of the program in 1940 exceeds $6,700,000,000. Applications and certificates covered every phase of industry, manufacture, mining and transportation. Subsequent to the transfer of this

program to the Chairman of the War Production Board on December 17, 1943, a total of 11,435 applications for necessity certificates were received and passed on by the War Production Board. Of these, 2,074 were approved, 4,268 were denied in part, 3,671 were denied in total, and 1,422 were withdrawn. In approximate dollar value, the total amount covered by applications for necessity certificates during this period was $1,498,730,000. Of time amount, $70,163,000 were approved and the total amount denied was $797,567,000.

23. Although accurate statistics are not available covering the exact percentages of such applications which were denied for various reasons, of the total amount of all certificates issued, a majority were granted for only a percentage of the amount applied for, varying in individual cases from 20 per cent to 80 per cent, dependent upon the determination of what portion of the material applied for were attributable to expenditures necessary in the interests of national defense during the emergency period. A substantial portion of the applications were denied, in whole or in part, for the reasons that application was not made in a timely manner as provided by Executive Order No. 9406 of December 17, 1943 and the regulations of the War Production Board.

24. The administration of Section 124 involved difficult and intricate problems. As put by Under Secretary of War Patterson:

Danger came from two directions. On one side, the law had to be administered so as to make it possible for the manufacturer actually to secure the protection it was designed to provide and to secure it so promptly that he would begin work at once. On the other hand, the Government had to be protected against any action

under the law which might confer upon firms using it, advantages beyond those legitimate and necessary to the enlisting of their cooperation in building defense facilities. Under the special circumstances which existed between the fall of France and Pearl Harbor, a belief that the Tax Amortization Law was being used as a means to gain undeserved profits might have reacted disastrously upon the whole defense program.

25. The whole philosophy of the program was an attempt "to map a careful course which would secure haste without waste". The determination of the application of the United States Graphite Company conformed to these principles.

Attachments.

SIDNEY T. THOMAS.

Sworn and subscribed before me this 27th day of December, 1946.

MARY M. REPETTI
Notary Public, D. C.

My commission expires Dec. 1, 1949.

Exhibit A

Filed Dec 30 1946

C. A. 36695

WAR DEPARTMENT
OFFICE OF THE UNDER SECRETARY
WASHINGTON, D. C.

A REPORT TO THE SECRETARY OF WAR ON THE ADMINISTRATION OF SECTION 124 OF THE INTERNAL REVENUE LAW RELATING TO THE ISSUE OF NECESSITY CERTIFICATES.

Introduction

Wars are often lost before the first shot is fired.

Fortunately enough Americans realized this back in 1940. Although the national peril was great, we were not at war. We were witnessing the tragic consequences of "too little and too late." Our Army was woefully small, and we were totally lacking in facilities capable of producing the vast quantities of munitions that would be required. Immediate action was needed to avert the fate of other unprepared nations.

Congress passed laws to get the men it knew we would need for our armed forces and to get the material with which to arm them. The Selective Training and Service Act was passed in September 1940 to get the men. The Tax Amortization law was passed in October 1940 to help get the material.

Private industry was naturally reluctant to risk its funds in the creation of war facilities. The Tax Amortization law was designed by Congress to give industry protection against possible bankruptcy and to encourage it to use its capital in building war facilities. The

law did this by allowing a write-off of the cost of the facilities within a period of five years.

This measure enabled us as a Nation to rely upon private industry for part of the needed expansion. It gave us the opportunity to build with speed the necessary facilities, not only to defend our shores but to attack the enemy without let-up.

The attached report shows how the law, by no means perfect as it was first written, was amended to become more efficient step by step. It shows how the problems of administering it, unexpected in their extent and complexity, were tackled and solved. It outlines a few of these problems.

The need for huge quantities of tanks, planes and guns was evident at the start. But for tanks, we needed steel; for steel, we needed coke; for coke, we needed coal; for coal we needed transportation. New facilities were needed to produce an enormous variety of items needed for the war ranging from alpha protein to fish oils, from igloos to synthetic rubber, from V-mail to yeast. The total of facilities certified by the War Department had a value of almost five billion dollars.

Certification had to be speedy, but it also had to be carefully administered so that the Government's interest would be protected. Infinite care and careful attention to details were essential in meeting the many unprecedented situations which arose. The distinction between facilities necessary for defense purposes and those which were not, was often difficult to make. There was no doubt that a machine gun plant ought to be certified, and relatively little doubt that movie theatres and facilities for providing soft drinks, candies and pies for war workers ought not to be certified. But there were cases in between these extremes, such as facilities for housing, for banks and for servicing firms,

where a correct decision as to the applicability of the law involved perplexities. Mistakes were doubtless made, but an important job was well done.

A pattern has here been written of how legislation designed to solve a technical and difficult problem can be put into action—perfected as it goes along—and, through intelligent administration, made to achieve notable success.

It is one chapter in the record of how this Nation, operating within a system of private enterprise which our enemies sneered at as stupid and inefficient, was able to arm itself with greater speed and throughness than any other Nation in history.

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WAR DEPARTMENT
OFFICE OF THE UNDER SECRETARY
WASHINGTON, D. C.

February 15, 1945

A REPORT TO THE SECRETARY OF WAR ON THE ADMINISTRATION OF SECTION 124 OF THE INTERNAL REVENUE LAW RELATING TO THE ISSUE OF NECESSITY CERTIFICATES.

THE NEED FOR THE AMORTIZATION LAW

At the beginning of our rearmament program in 1940, industry was hesitant to accept contracts whose completion would require the use of private capital for creation of new facilities. Since we were not at war, and the future of the defense program hinged upon events and policies which could not be predicted with any certainty, industry could not ignore the possibility

that conversions and expansions undertaken for defense purposes might not be kept in operation long enough to repay their cost, if the usual rate of amortization was employed. The hesitancy which this provoked was increased by two other factors, (1) the stringency with which the existing revenue laws treated facility costs in computing income, and (2) the prospect of greatly increased rates of taxation. Not only were these rates likely to increase, but no one could say exactly when or by how much.

In the light of these uncertainties, the hesitancy of industry was understandable. At the same time, speedy plant expansion and conversion were vital military necessities. Something had to be done to reconcile financial prudence with urgent military need. To bring this about some assurance was needed that, in computing income, special allowance would be made for the possibility that war facilities would become useless before the expiration of their normal life. In view of the probability that earnings would be high for a brief period, and then might drop, it seemed only fair to permit the cost of the facilities to be taken out of the high income during the period in which it was being earned.

In addition to the difficulties already mentioned, prospective contractors also had to take into account the existence of a tax law designed to limit profits. This was the Vinson-Trammel Act which had originally limited profits on naval and aircraft construction to 12%, but which was amended, at exactly the the moment when a great facilities expansion became necessary, to limit profits to 8%. In addition, there was every indication that Congress would provide a very high excess profits tax to cover the period of maximum earnings. This tax policy threatened to prevent a company accumulating enough surplus to ab-

sorb the portion of the cost of the facilities which remained unabsorbed at the cessation of war production. Even patriotism could not reasonably be expected to induce a contractor to court bankruptcy by tying up a large portion of his capital, much of it borrowed, in factory expansion which might suddenly become valueless. Some means had to be devised to allow the return to [of?] the cost of their expansion to the contractor while the expanded facilities were being used in war production.

The Treasury took the position that, under existing law, the depreciation period could not be accelerated. It could give no assurance of a deduction for partial loss of useful value which, as soon as the emergency was over, would have allowed the writing down of the facilities to their post-war value. This inability to offer the contractor any assurance of special treatment of his war facilities for tax purposes made industry hesitate seriously about executing contracts for rearmament. The defense program was thus placed in serious jeopardy.

On May 26, 1940, the President called upon private industry for help in rearmament and recognized that, in view of a possible curtailment of orders within a year or two, private industry could not be expected to assume all the financial risks of this expansion. In a report of the Committee on Ways and Means of the House of Representatives on June 10, 1940 (Report No. 2491) made in connection with a revenue bill then under consideration, it was stated that proposals had been made to provide special amortization for national defense industries and to impose excess profits tax. The two proposals were to be considered as interdependent. A press release from the White House on July 10, 1940 announced that it had been decided to incorporate in the excess profits tax bill, which was

soon to be introduced, a provision for amortization over a five-year period of new facilities certified as necessary for the purpose of national defense. The announcement stated:

The contemplated action is expected not only to simplify the multiple tax problems of prospective contractors but to greatly clarify their future tax liabilities.

In this manner any doubts as to the tax position of contractors in the general program of national rearmament will be removed and they will be able quickly to execute defense contracts.

Legislative History—The Basic Law

World War I Law. There had been an amortization law for World War I but it was not considered a useful model. It had not been passed until three months after the Armistice; it provided for amortization on the basis of loss of useful value, an intangible factor which was to be determined by the courts. Consequent litigation had dragged on for years.

Basis for new law. In order to provide a law susceptible of exact calculation, it was decided that the new amortization provision should be based upon depreciation rather than loss of useful value. In other words, deduction of the entire cost of new defense plants was to be permitted during the period in which orders for war material continued. Because it was recognized that it was nearly impossible to determine in advance what facilities would be useful, and how far they would be useful, when war orders ceased, it was decided to permit the charging off of the entire cost, or a predetermined percentage thereof. Because it was also impossible to know in advance how long the facilities would be engaged on war work, the tenta-

tive amortization period was fixed at five years, with provision for shortening the period and accelerating amortization correspondingly, with proper readjustment of the tax, if war orders did not require the use of the facilities for the full period of five years.

In order to provide a law susceptible of speedy administration, it was concluded that decisions as to necessity should be made not by the courts but by the procuring agencies, which could be expected to know best whether a particular expansion was necessary to national defense.

Introduction of bill. Provisions for amortization were incorporated in the bill, H.R. 10413, together with provisions for imposing an excess profits tax and for suspending the profit-limiting provisions of the Vinson-Trammel Act during the period in which the excess profits tax was in effect.

The Assistant Secretary of the Treasury, in explaining the bill, stated that the existing provisions for depreciation were designed to allow the cost of facilities as deductions from income during the years in which the asset contributed to income, but he recognized the inadequacy of these existing provisions when applied to facilities for the defense program.

Following the joint hearings of the Ways and Means Committee and the Senate Finance Committee, which consumed five days, H. R. 10413 was introduced in the House on August 27, 1940 and was passed without amendment on August 29.

Conditions in granting of amortization—Subsection (1). Objection was raised in the Senate to three subsections of the amortization provisions of the bill passed by the House. These subsections, (l), (j), and (k), incorporated a policy designed to insure the con-

tinued existence of the amortized facilities for possible further use in national defense. To provide for this it was stipulated, under penalty of an increased tax liability, that the facilities for which amortization deductions were taken were not to be destroyed or substantially altered without the consent in writing of the Secretary of War or the Secretary of the Navy. If consent was refused the Government was obligated to purchase the facilities at a price not in excess of the adjusted base nor less than one dollar, with provision for repurchase by the taxpayer under certain circumstances.

The Advisory Commission to the Council of National Defense asked for the elimination of these three subsections. The Commission expressed full approval of their purpose but believed the objective could best be accomplished through contract provisions. In this connection the Advisory Commission outlined a contracting policy which it believed would adequately protect the interest of the Government in facilities which were accorded amortization.

The Finance Committee, after concluding its hearings, reported the bill back to the Senate with amendments. The principal amendment was a substitute subsection (i) to take the place of subsections (i), (j), and (k). The new subsection (i) required, in the alternative, either "non-reimbursement" or "government protection" as a condition to amortization. The Senate passed the bill as thus modified, and in conference the substitute subsection (i) was agreed upon.

Certificates Contemplated by Act. The Act, was finally approved on October 8, 1940 (Public Law 801, 76th Congress; Section 124 Internal Revenue Code) provided as follows:

Necessity Certificate. For facilities acquired or constructed after June 10, 1940*, which the Advisory Commission and either the Secretary of War or the Secretary of the Navy by the issuance of a "Necessity Certificate" certified were necessary in the interest of national defense, an annual deduction of 20% of the cost could be taken at the election of the taxpayer. Thus, these facilities could be amortized in five years.

Certificates of Non-Reimbursement and Government Protection. By the terms of subsection (i), the amortization deduction was allowed only upon condition that the contract offered no direct or indirect reimbursement in excess of normal exhaustion, wear and tear, unless the contract which afforded such reimbursement also contained terms which adequately protected the interest of the United States Government in the future use and disposition of the facility. The fact that no reimbursement had been offered in a particular contract could be established, with respect to any given contract, by a Certificate of Non-Reimbursement issued jointly by the Advisory Commission and either the War or Navy Departments. The fact that the contract adequately protected the interests of the government could be established by a Certificate of Government Protection, similarly issued.

Non-Necessity Certificate. If before the expiration of the five-year period the Secretary of War or the Secretary of the Navy certified by issuance of a "Non-Necessity Certificate" that particular facilities had ceased to be necessary, provision was made, at the tax-

* This date was agreed upon in conference, it being the date upon which the House Ways and Means Committee reported its intention to consider an amortization act. It was thought that a decision to build or acquire facilities after that date might be assumed to have been made with a promise of amortization. The original draft had fixed upon the date of the White House release, July 10, 1940.

payer's option, to recompute the amortization deduction so as to provide full amortization over the shortened period. A similar privilege was given, without issuance of a certificate, to all owners of certified facilities if the President proclaimed that a substantial portion of the certified facilities had ceased to be necessary. Taxes were to be recomputed in accordance with the recomputed amortization.

Payment Certificate. The Act also provided for certification by the Secretary of War or the Secretary of the Navy of the fact of payment in cases where a payment was made for unamortized costs because the contract involving the use of the facilities had been terminated by its terms or by cancellation, or in cases where a contemplated contract involving the use of the facilities was not granted. In such cases amortization was to be accelerated, at the election of the taxpayer, by permitting a larger deduction for the year of the payment.

Amendments of the Law

Filing Date. As passed on October 8, 1940, the amortization law provided that Necessity Certificates should not be issued unless issued before the beginning of the construction or the date of acquisition; except that in the case of facilities already started or acquired when the law was passed, the certificate had to be issued before February 6, 1941. This time limit for the issuance of a certificate, regardless of the time of filing the application, afforded no opportunity for investigation and made the statute impossible to administer. As the February 6 deadline approached, the necessity for legislative change became obvious. The matter was laid before Congress, and on January 31, 1941, Public Law No. 3, 77th Congress, (H.J. Res. 80) was passed amending the law so as to eliminate the

fixed date and provide instead that an application for a necessity certificate must be filed within 60 days of the beginning of construction or of the date of acquisition or before February 6, 1941.

Although this provided ample time for the proper consideration of cases, it was found by late spring that the continually growing demand for war material caused such frequent changes in plans for facilities that the time limit of 60 days for the filing of applications was unsatisfactory. The War and Navy Departments accordingly proposed to Congress on July 30, 1941 that the law be amended to extend to six months the period in which applications must be filed. This, it was hoped, would make it possible to gather in one application proposals which had previously appeared in two or more. The amendment, together with others described below were passed by Congress. The President gave his approval to it as Public Law 285, 77th Congress (H.J. Res. 235) on October 30, 1941.

Joint Certification. The requirement of joint certification by two governmental authorities had all the disadvantages of divided responsibility. Administrative history in the past had often proved the unwisdom of such an arrangement; experience with the Amortization Law proved it once more. While the War and Navy Departments had agreed with the Advisory Commission of the Council of National Defense on instructions for the preparation of applications early in November of 1940, agreement on general principles for deciding cases was not achieved. Particular difficulty was encountered with respect to Certificates of Non-Reimbursement and Government Protection. Every attempt was made on both sides to be judicial, but agreement was not achieved. Since there was no machinery for appeal, deadlocks were inevitable and delays in administration became sufficiently serious to

give contractors just cause for concern. A change in the law was necessary. The Armed Services urged that they be relieved of responsibility or given sole responsibility. By the fall of 1941, the Advisory Commission had practically no active functions other than that of certifying orders under the Amortization Law. The Armed Services, being the procuring agencies, were in the best position to decide the facility needs of their procurement programs, Once convinced that joint certification was a failure, Congress had little hesitation in terminating the Advisory Commission's certifying authority. This was done on October 30, 1941. From then on, War Department cases were decided by the War Department alone and Navy cases decided by the Navy alone. In due course of time, both agencies came to lean heavily upon the able assistance of the War Production Board in matters involving civilian supply.

Non-Reimbursement and Government Protection. Because sub-section (i) of the basic law required certification that there had been no reimbursement or in the alternative that there had been government protection, every contract, even those for small amounts of standard supplies, had to be examined. In the absence of either a Certificate of Non-Reimbursement or a Certificate of Government Protection, no assurance could be given the contractor that he would be entitled to amortization under his Necessity Certificate.

Determination of whether or not the price included reimbursement for more than normal depreciation proved almost impossible of attainment.

It was also difficult to establish standards for protection of the government's interest in amortizable facilities. An attempt was made to arrive at a uniform contract provision to be inserted in all supply con-

tracts involving additional facilities, which would adequately protect the interest of the United States in the future use or disposition of the facilities and would legally warrant the issuance of a Certificate of Government Protection. However, the Attorney General gave his approval only to provisions which proved unworkable from a practical standpoint.

Some relief was secured by the October 30, 1941 amendment to the law (Public Law 285) whereby contracts under $15,000 and contracts for non-defense supplies were excluded from examination for reimbursement of facility costs. But there still remained the apparently insuperable difficulty of deciding whether the unit price in the numerous larger contracts included an amount in excess of normal depreciation. The amortization law was intended to overcome the hesitancy of contractors to invest private funds in needed facilities. To do this effectively the necessary certificates had to be issued at approximately the time of contracting for the facilities. By the end of 1941 Necessity Certificates had been issued by the War Department on $1,210,700,000 of facilities but the record on Certificates on Non-Reimbursement and on Government Protection was unsatisfactory. 3,120 applications had been made to the War Department for certificates of Non-Reimbursement; only 278 had been issued. 219 applications had been received for Certificate of Government Protection; only 30 had been issued. Delay was causing considerable doubt about the amortization allowance. Hesitancy on the part of prospective contractors continued.

This was the situation when the United States was attacked by Japan. In spite of the gathering danger, the flow of private capital into plant expansions had not been rapid. And although a vast amount of Government financing had been provided, the tremendous

demands which the coming war set up made it highly desirable to afford private capital an adequate opportunity to serve.

On December 17, 1941, the War and Navy Departments proposed to Congress the repeal of subsection (i) as of the date of its passage. They took the position that the protection of the interest of the Government could be assured by a sound contracting policy at the time the contract was agreed upon. By that time the War Department had gained a great deal of experience with the problems involved in contracting for supplies requiring new or additional facilities. In view of the grave situation created by the outbreak of war, and the urgent need for making the greatest practicable use of private financing, it seemed only reasonable to rely upon this experience, rather than rigid rules, in administering the Amortization Act.

On February 5, 1942, H. J. Res. 257 (Public Law 436) which repealed subsection (i) as of the date of its passage was approved. With its passage the major obstacle in administering the Amortization Act was removed.

Further Amendments.

Under the original act only corporations were allowed amortization deductions. Although never clearly stated, it was understood that this limitation sprang from the fact that only corporations were liable to the excess profits tax. From time to time the question was raised whether individuals or partnerships, operating as such ought not to be included. As a consequence, in the Revenue Act of 1942, the Treasury Department suggested the extension of amortization to individuals and partnerships and the law was so amended by Public Law No. 753, 79th Congress. This same Act also permitted, for the first time, amortization of facilities

acquired prior to June 10, 1940, the earliest permissible date of acquisition being extended back to January 1, 1940. The War Department neither offered nor expressly favored these amendments.

Administration by the War Department

Delegation to Under Secretary. On October 15, 1940, one week after the passage of the Amortization Law, the Secretary of War delegated to the then Assistant Secretary of War (later Under Secretary of War) the duty of considering and acting upon the certificates which the Act required the Secretary of War to issue.

Organization of Tax Amortization Unit. A unit was established in the Office of the Assistant Secretary of War to administer the Act and to advise the Assistant Secretary as to the action to be taken upon applications. It was not formalized until Mr. Samuel Duryee became its Chief in December 1940. Lt. Colonel (now Brig. General) Edward S. Greenbaum took over as acting Chief in March 1941 and carried that responsibility along with his other duties until January 1942. Lt. Colonel (now Colonel) George H. Foster then became Chief and held that position until the work was completed in 1944. The entire staff including military and civilian personnel was never more than 80 persons at any one time. Although this unit with its personnel and records has been transferred to different Divisions of the War Department, it has continued since its inception to administer the law under, and has remained responsible to the Under Secretary. All policy matters were settled in consultation with him and each certificate granted or denied received his approval.

Appointment of Advisory Board. In April, 1941, the Under Secretary appointed an advisory board,

composed of men prominent in civil life, to examine applications for amortization with particular reference to the issuance of Certificates of Non-Reimbursement. These men gave generously of their time and experience and greatly aided the War Department in its effort to solve these difficult problems. The Board was composed of:

James P. Baxter, 3rd, President, Williams College, Massachusetts

Samuel S. Duryee, Attorney, New York City

W. Tudor Gardiner, Former Governor of Maine

Garrard Glenn, Professor of Law, University of Virginia

James Hall, C. P. A., New York City

F. H. Hurdman, C. P. A., New York City

Bernard Knollenberg, Librarian, Yale University, Connecticut

James M. Landis, Dean, Harvard Law School

Harold F. Linder, Retired, New York City

William L. Marbury, Lawyer, Baltimore, Maryland

Abbot P. Mills, Attorney, Washington, D. C.

Dave H. Morris, Jr., Banker, New York City

Charles H. Murchison, Attorney, Jacksonville, Florida

George S. Olive, C. P. A., Indianapolis, Indiana

Frederick F. Umhey, Executive Secretary, International Ladies Garment Workers Union, New York City.

(David Dubinsky, President of the International Ladies Garment Workers Union, was originally ap-

pointed, but at his request Mr. Umhey was appointed in his place.)

With the repeal of the non-reimbursement and government protection provisions of the law, the principal duties of the Board ceased. However, the aid of individual members was from time to time obtained in deciding the more difficult questions relating to necessity certificate applications. In the Spring of 1942, a working committee of three was formed, composed of Mr. Hall, Mr. Umhey and Professor Glenn (who was later forced to withdraw because of ill health). They made regular trips to Washington in order to advise on policies or specific cases and preside over hearings with applicants. Their work was of material assistance to the War Department.

Regulations. War Department interpretation of the law was based upon Regulations governing the issuance of Necessity Certificates, drawn up by a three-man Committee consisting of representatives of the War Department, Navy and War Production Board, and approved by the President May 22, 1942.

The regulations set no hard and fast rules except as to purely procedural matters such as timeliness of filing. The guides to be followed in determining necessity were quite simple and can be briefly summarized as follows. The necessity of a facility was to be determined in accordance with whether the supply it produced was required in the interest of national defense. A supply might be so required if essential to the armed forces, to any foreign nation furnished supplies under an act of Congress, or, under certain circumstances, even if it had only civilian use. Shortage of capacity in the industry must ordinarily be shown in order to justify an expansion.

Shortage of Capacity. The basic reason for insisting on a showing of shortage of capacity, rather than to increase the capacity of a particular company to meet its contract requirements, was the desire to spread contracts more evenly among all portions of an industry capable of producing the required items. Although generally successful in helping to spread the work, this policy necessarily required the denial of applications in cases where other companies possessed idle facilities capable of producing the needed items. When, at a later date, war production had to be doubled and trebled, the resulting shortage in capacity compelled the reconsideration of these original denials.

Types of Supplies. In the beginning it was evident that tanks, planes, guns, and ships would be demanded in quantities far beyond the existing fabricating capacity of the country. Shortly it became apparent that additional basic steel capacity was necessary. This in turn required more coke ovens for coke, more coal for coke, more iron ore, hence more mining facilities, and more transportation facilities to move the ore, coal, coke, and steel to places of usefulness. Workmen had to be transported to and from work, or housed at places of employment. Applications for the certification of transportation facilities and war housing were presented for decision. At many plants the rapid expansion of personnel led to the inauguration of "in-plant feeding." This brought applications for cafeteria facilities in the plants. A few of the items which were at one time or another determined to be necessary on the particular facts of the case, picked entirely at random, may be listed to give some idea of their great variety:

alpha protein, aircraft antenna, anti-toxins, arsenicals, balloon barrage wiring, balloon cloth, blitz cans, box shook, commercial alcohol, cotton duck, cord, cus-

pidors, dehydrated foods, dyes, ether, felt, fire extinguishers, fish oils, glue, gun butts, gun stocks, hard chrome plating, igloos, insulation materials, jeans, jungle boots, lenses, life preservers, lime, nicotinic acid, parachutes, paulins, pliers, plywood, pigments, ponderosa pine, poplins, prisms, remote control systems, resin coated raincoats, safety belts, shearlings, slide rules, soluble coffee, steel casings, steel tubing, sulpha drugs, surgical dresings, synthetic rubber, sythetic sapphire, tallow, tin plating, tuads, V-mail, water purification machines, webbing, wire cutters, wrenches, and yeast.

Other Factors. In addition to the specific legal and administrative problems governing amortization, it was necessary to take into account broad problems of contract distribution, priorities, price control, and many other factors affecting the transfer from a peace to a war economy. In determining the need for facilities it was necessary, not only to consider contract commitments and future demands related thereto, but to place the request for certification in its proper place in the over-all picture of expansion, priorities, contract distribution, and other problems and policies. When a decision on a particular case was finally made, it represented an investigation of the industrial consequences which might spring from it. As the country approached an all-out war effort it became more and more difficult to decide where to draw the line. Although some general trends of procedure might be traced, the policy was predominantly one of judging each case on its merits.

Relation to National Defense. Certain facilities were obviously too far removed from the war to be certifiable. New construction of an office building in a large city was denied even though there was indication that its construction would ultimately be of indirect bene-

fit to the defense program. And even though the Office of the Petroleum Co-ordinator requested wholesale conversion of oil burners to coal burners, such conversion was not certified where the applicant's product was not necessary. Applications related to such services as engineering were denied (the product of engineering firms being denominated as intellectual rather than physical) as were those related to retail distribution.

Time of Expansion. The decision as to necessity was made as of the time of expansion or later certification. In some cases the application was not received until after the facility was no longer necessary. Certain expansions of the natural rubber fabricating industry, of tin fabrication and of toluene processing (to use South American oil) were started and thereafter proved ineffective due to the situation arising after Pearl Harbor. However, amortization was granted because the facilities had been necessary when constructed.

Items Unnecessary for Defense Purposes. On occasion, an applicant was allowed certification of a larger facility than it actually needed if there was convincing evidence that no smaller facility was available. A company purchased "the only location we could get" which was "probably a third more than our requirements." Certification was granted on evidence that the useful part of the land was necessary and none other available. But where shortage of building space resulted from the fact that the applicant was building for permanence with comparative luxury, certification of a new building was denied. For the War Department was careful not to certify facilities which were in the luxury class. Plants to produce soft drinks and pies in this country were denied, as were bottled drink and candy trucks and vending machines. Certi-

fication was denied for electric signs, glass desk tops, fish ponds, ping pong tables, pool tables and soda fountains. A flag pole was considered certifiable. Expensive carpets were denied. (But where the applicant's business involved use of diamonds, often dropped on the floor, a carpet was certified.) Air conditioning was ordinarily denied as a luxury; certified where necessary for precision work or for other extraordinary reasons. While facilities for employees were in general allowed, the expansion of a bank to accommodate defense workers and soldiers was denied, as was a shopping unit to be built in connection with a housing project consisting of a restaurant, recreation building, doctors' and dentists' offices, movie theatre, drug store, etc. Couches were on occasion denied, yet where a shift was made from male to female labor and heat prostration was a frequent occurrence in a plant, they were obviously necessary and they were certified.

Costs: Derivation of Funds: Reconversion. The cost of a facility was in general considered a matter in the discretion of the applicant so that if the facility was appropriate and necessary, inquiry was not made as to whether it was purchased or constructed for the lowest possible price or cheapest type of construction. Nor was inquiry made of the source of the funds from which the purchase was made. A new plant was about to be constructed following condemnation of an older plant; presumably it was financed with funds received from the condemnation; the application was certified. The cost of conversion from peacetime to war use was certified, but no certificate granted for an allowance in order to reconvert to peacetime use after the war.

Acquisition of Leased Property. Many applications were received for purchase of formerly leased property. In these case, careful inquiry was made as to

whether the purchase was actually necessary or whether is was feasible for the applicant to continue to lease; if the latter was the case, certification was refused.

Acquisition from Related Persons. Purchase of facilities from related persons were not ordinarily certified. Applications were denied involving purchase of land from the president of the applicant corporation or from his father, or from companies having substantial interlocking stock interests. However, the cost of transporting facilities from the plant of one related person to another was certified.

Second-hand Facilities. Care was also taken in screening applications for purchases of second-hand facilities. Used freight cars sold by one railroad to another were on occasion denied as were purchases of used locomotives, ships and barges. Such transfers did nothing to increase over-all transportation facilities. On the other hand, where barges were bought second-hand for $59,000, the cost of reconditioning was $400,000 and the barges had been idle for a year due to the completion of a bridge which rendered unnecessary their former use as ferries, the purchase price and reconditioning cost were certified. A similar rule was applied to already existing plants or buildings, although in such cases it was ordinarily easier to prove the transfer was necessary. Thus, while acquisition of an existing grain storage elevator was denied certification, the acquisition of a textile factory which was going to be junked, was certified. Purchase of a brewery to be used for dried egg production (urgently required by Lend-Lease) was certified: such conversions from normal use to war use were, indeed, common—from production of permanent waving machines to aircraft instruments, from soda fountain equipment to machine guns, from pants pressing to 20 mm. shot,

from coffins to shells. With second-hand equipment such as tools, or materials, it was not ordinarily feasible to inquire as to previous use, and certification was made where the acquisition was necessary. Inquiry, in fact, had revealed on occasion a decided increase in usefulness; an example was use by an ordnance manufacturer of steel acquired from a World's Fair Building.

Defense Plant Corporation Facilities. The Defense Plant Corporation had been organized by the Reconstruction Finance Corporation to finance war facilities which were to be privately operated but government-owned (owned by the Defense Plant Corporation) and leased to the operator. In certain cases the operator desired to purchase the facility from the Defense Plant Corporation. Such acquisition would not have increased over-all productive capacity but it it would have encouraged use of private capital in war industry. The conclusion was reached that, in general, acquisitions from the Defense Plant Corporation were not within the scope of the Amortization Law and applications for their certification were denied.

Motive. The applicant's motive in making the expansion was not inquired into. A tramway installed in a coal mine was certified on evidence that it increased production despite an indication that the applicant's motive was to save money in disposing of waste material. Similarly, an addition to power plant facilities apparently made to save costs was certified on evidence that the addition saved fuel. The original use of the facility, however, was considered important. In an early case, a building had been erected to produce 70% peacetime products and 30% war products. A 30% certificate was granted. Later, the owner (without additional expense) converted the remaining 70% of its plant to war work and requested 100% certi-

fication. The request was denied. In a somewhat similar case, a plant was erected to produce an unnecessary product (91 octane gasoline) in 1940. Two years later, the applicant erected additional facilities which, when combined with the 1940 facilities would produce a necessary product (100 octane gasoline). Certification was limited to the 1942 facilities. In yet another case, the applicant started to build a factory for production of electric sirens. Before construction was completed, the applicant was advised that electric sirens were not necessary. It accordingly completed its building to produce certain Ordnance supplies (which were necessary). The entire construction was certified.

Efforts to Limit Amortization

By the spring of 1943 it was becoming apparent that the chief limiting factor in the production of war supplies no longer was facility capacity but materials and manpower. The use of steel and manpower to create factories, which could not then be fully used because of a lack of materials and workers, would do injury to the war effort. The search for maximum war production now required, not an encouragement of facility expansion, but a curbing of it. On May 12, 1943 the War Production Board publicly announced:

> With the exception of certain special programs, some special machinery, and further expansion of raw materials production, the United States at last has the machine tools and the capital equipment it needs to build production to defeat the Axis. For the first time in its history, the nation now has a physical plant adequate to make the maximum use of its resources in men, skill and materials.

An examination of our production effort up to that point revealed that the nation had devoted almost as

much effort to the construction of necessary facilities as it had to the actual production of arms and munitions. Thereafter, it was believed, the greater part of of the plants and materials which had been used so far in making machinery and equipment ought to be devoted directly to manufacturing planes, guns, tanks, and other munitions. It was suggested, therefore, that steps be taken either to restrict certification very rigidly, or to terminate it entirely.

Another factor also suggested the need for a reconsideration of the amortization problem. The broad language of the act did not limit amortization to facilities for producing supplies for direct military or naval use. An increasing number of applications came in for certification of facilities in fields not under the control of the War and Navy Departments. Facilities needed in connection with transportation, the processing of food, and the production of raw materials were all deemed necessary by the agencies charged with coordinating these activities. During the period when facilities for direct military and naval supplies constituted the bulk of the expansion program, and other facilities were of minor significance, certification of cases of the latter type had been made by the War and Navy Departments upon the recommendation of the other agencies. However, in view of the fact that the War and Navy Departments were usually not directly conversant with the needs of the particular cases, it was thought that, if these cases were going to increase, certification ought to be by some other agency better able to judge their merits.

On June 25, 1943 the matter was submitted to the Office of War Mobilization, with a suggestion of possible alternatives. The Director of War Mobilization, after considering the matter, directed the War and Navy Departments to amend the regulations gov-

erning the issuance of Necessity Certificates so as to provide that certification should be discontinued. He did suggest, however, that the issuance of certificates for facilities for a military or naval supply might still be authorized in exceptional and limited cases where the need had been determined before expansion. A survey among the supply services of the War Department had revealed that in some programs further expansion was required.

Therefore, an amendment to the existing regulations was submitted to the President for approval. This provided that with the exception of facilities contracted for before the date of the amendment, no facility could be considered for certification unless the certificate was issued before the expansion started. It also provided that further certification under this restriction should be made only in cases of facilities for a supply for military or naval uses, and then only after consideration of the relative advantage of governmental financing as against private financing with amortization. Simultaneously, the technical services of the War Department were advised that, where additional facilities were required and were not available from Government-owned facilities, and the private companies which could provide them were unwilling to finance them without amortization, arrangements should be made for Government financing. A few cases, it was recognized, might still arise which ought to be handled by amortization, but they would be limited to exceptional situations.

The amendment was approved by the President on October 5, 1943. Subsequently, notwithstanding the amendment, the War Department was strongly urged to issue certificates for facilities for purposes not directly military but nevertheless claimed to be essential to national defense. The Office of Defense Trans-

portation, in particular, had urged that transportation facilities be expanded to relieve the tight situation created by increasingly heavy shipments to the West Coast. On November 1, 1943, the War Department called this situation to the attention of the Office of War Mobilization with the suggestion that if certification was to be made in such cases, it should be done by the War Production Board. Thus, the question of amortization could be settled by the same agency which authorized the use of materials for the contemplated expansion. On December 17, 1943, the President, by Executive Order, transferred the function of issuing Necessity Certificates in all future cases from the Secretary of War and the Secretary of the Navy to the Chairman of the War Production Board. The War and Navy Departments, however, were to decide the applications then on file.

Non-Necessity and Payment Certificates. By Executive Order No. 9486 of September 30, 1944, the power and the responsibility of the War Department in the issuance of Non-Necessity Certificates was transferred to the Chairman of the War Production Board, to be exercised by him in connection with his responsibility for guiding reconversion from war to peace-time production. By Executive Order No. 9490 of October 20, 1944, all the remaining functions of the War Department in connection with certification under Section 124 were likewise transferred to the Chairman of the War Production Board. This latter order covered amendments of Necessity Certificates already issued and Payment Certificates under subsection (h). Since the War Department had never issued a Non-Necessity Certificate under subsection (d), and had issued only three Payment Certificates under subsection (h). Executive Order No. 9490 in

effect transferred a function which had never been exercised.

Statistical Summary

In the period between the passage of the Tax Amortization Act and the transfer of the certification authority to the War Production Board, 31,047 applications for Necessity Certificates were filed for consideration by the War Department. From among that number the War Department issued 26,775 certificates covering the whole or part of the application. The remaining 4,272 cases were denied, withdrawn, or otherwise disposed of. The total dollar value of the facilities certified, on the basis of their estimated worth on the date of application, was $4,955,813,760.16.

A break-down of the figures is provided in the table which follows. It should be noted that the total in this table is three hundred million less than that cited above. The difference arises from the fact that the table is taken from the statistics compiled, first by the Advisory Commission, and later by the statistical sections of the War Production Board after the Advisory Commission ceased to be a joint certifying authority in October 1941. In this compilation, after April 1943, all facilities of less than $25,000 in value in any one plant were excluded. The War Department figures includes them.

Type of Product	*Estimated Cost*	*Percentage*
Manufacturing		
Aircraft, Engines, Parts & Access.	$ 365,731,000	7.93
Ship Construction & Repair	12,234,000	0.27
Combat & Other Motorized Vehicles	100,547,000	2.18
Guns	95,846,000	2.08
Ammunition, Shells & Bombs	135,372,000	2.93
Explosives & Ammunition Loading	13,025,000	0.28
Iron & Steel		
Basic	270,062,000	5.85
Fabricated	82,009,000	1.78
Nonferrous Metals & Their Products		
Aluminum & Magnesium	306,462,000	6.64
Other	56,265,000	1.22
Mach. Tools & Other Metal Work. Equip.	158,603,000	3.44
Machinery and Elec. Equip. & Appl.	213,273,000	4.62
Chemicals		
Synthetic Rubber	40,440,000	0.88
Other	288,405,000	6.25
Coal and Petroleum Products		
Aviation Gasoline	437,727,000	9.49
Other	100,863,000	2.19
Food Processing	35,373,000	0.77
Miscellaneous	319,777,000	6.93
TOTAL MANUFACTURING	$3,032,014,000	
Mining and Industrial Service		
Mining	82,318,000	1.78
Gas, Light, Heat and Power		
Electric Power Generation	123,837,000	2.68
Electric Power Transmission	109,032,000	2.36
Gas Manufacture and Transmission	48,499,000	1.05
Steam, Heat and Power	6,404,000	0.14
TOTAL MINING	$ 370,090,000	
Transportation and Related Service		
Rail	1,066,868,000	23.13
Pipe-line	17,654,000	0.38
Motor, Air and Water	84,489,000	1.83
Terminal Facilities	2,371,000	0.05
TOTAL TRANSPORTATION	$1,171,382,000	
Communication	6,419,000	0.14
Non-Industrial Service	32,931,000	0.71
GRAND TOTAL	$4,612,836,000	

After the transfer of the certification authority to the War Production Board, the War Department's action upon new applications was limited to making recommendations at the request of the War Production Board when it was claimed that the facilities were necessary for military supply. The fact that relatively few cases came up in which the need for additional privately financed facilities for military supply was es-

tablished confirmed the War Department in its belief that the need for amortization as an inducement to the private financing of such facilities had come practically to an end. The War Department disposed of its backlog of about five thousand applications filed prior to the transfer of the certification authority by July 19, 1944.

Conclusion

The history of the Tax Amortization Law, and of its administration by the War Department, are topics full of technical and difficult detail. Yet, behind these complexities, lay the stark necessities of national defense in one of the greatest emergencies of our history. We either had to build an unparalleled munitions industry within the space of a few months or face disaster. We had to do so within the framework of the system of private enterprise, not only because that was the system in which we believed, but also because it was the system we had, and any attempt to change it suddenly would have brought dangerous confusion and delay.

This could not be achieved, however, merely be broad declarations of principle. Appeals to patriotism alone could not relieve the individual manufacturer of the necessity for remaining solvent. He could be asked to undertake the rapid expansion which national defense required for an activity of uncertain duration, only if he were given reasonable protection against bankruptcy at the end of the effort. The Tax Amortization Law was designed to provide that protection.

But the mere passage of the law did not remove the difficulty. Under any circumstances difficult problems of administering it would have arisen, problems which, unless solved, could largely destroy its intended effect. Danger came from two directions. On one side, the law had to be administered so as to make it possible for the

manufacturer actually to secure the protection it was designed to provide and to secure it so promptly that he would begin work at once. On the other hand, the Government had to be protected against any action under the law which might confer upon firms using it advantages beyond those legitimate and necessary to the enlisting of the cooperation in building defense facilities. Under the special circumstances which existed between the fall of France and Pearl Harbor, a belief that the Tax Amortization Law was being used as a means to gain undeserved profits might have reacted disastrously upon the whole defense program.

The problem of the administration of the law was, therefore, an unusually thorny one. It was necessary to map a careful course which would secure haste without waste. Little help could be gained from precedent of past experience. Many difficulties were encountered. Not all of them were solved satisfactorily; perhaps some of them never could have been. Nevertheless, we got the plants, which in turn produced the guns, tanks, and planes. It is a reasonable conclusion that, without the Tax Amortization Law the construction of our munitions industry would have been seriously retarded. Had that occurred, our position today might have been very different from what it is.

ROBERT P. PATTERSON
Under Secretary of War

Filed Dec 30 1946

* * * * * * * * *

Exhibit F

Filed Dec 30 1946

WAR PRODUCTION BOARD
WASHINGTON, D. C.

February 9, 1944

MEMORANDUM

To: The Industry Divisions, War Production Board
Facilities and Inspection Branch,
Production Division, War Department
The Bureaus of the Navy Department
U. S. Maritime Commission
The Office of War Utilities
The Office of Defense Transportation
The Petroleum Administrator for War
War Foods Administration
Office of the Rubber Director

From: The Facilities Bureau
Deputy Director for Tax Amortization

Attached is a statement designed to be of aid in the preparation of recommendations. It is not intended to be all inclusive. Additional information may, from time to time be requested by members of the staff of the Tax Amortization Branch.

CARMAN G. BLOUGH
Carman G. Blough
Deputy Director for Tax Amortization Facilities Bureau

PREPARATION OF RECOMMENDATIONS FOR TAX AMORTIZATION

The Government's substantial monetary interest in facilities covered by a Necessity Certificate must be recognized. Amortization represents an abnormal tax deduction and hence a loss of revenue to the Government. In the case of companies in the higher tax brackets, this may amount to 81 percent of the cost of the facilities.

No facility will be certified unless the war effort would actually be weakened by the lack thereof. This bears upon the degree of essentiality. The facility cannot be merely desirable, helpful or appropriate. It must be essential and must be required exclusively for production of one or more of the supplies enumerated in Section (3)(a) of the WPB Regulations governing the issuance of Necessity Certificates. An overall shortage of facilities in the industry or a situation covered by Section (3)(b)(ii) of the Regulations must be found to exist.

In determining whether it is to the advantage of the Government that the facilities be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market may be assumed to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, if a facility appears to be of such a type that it would have a reasonably wide market after the war, it may generally be assumed that, provided the DPC or other government agency is willing to purchase it, it would be to the advantage of the Government

that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a percentage certificate were issued, such percentage being based, for example, on excess cost attributable to the war.

Reports must contain the findings required by Section (3)(b) of the Regulations, the most fundamental of which is the finding of an overall shortage of facilities required for the production of supplies necessary in the interest of national defense. Replacements, acquisitions from an affiliate, etc., must be commented on.

Reports must contain an expression of opinion whether it is to the advantage of the Government that the facilities be privately financed and must state the reasons. A favorable recommendation must contain a statement that, recognizing the Government's financial interest in a certified facility, the facilities listed in Appendix A are so essential to the progress of the war that the reporting agency recommends issuance of a certificate.

Reports must contain a statement of the percentage of cost recommended for certification.

Exhibit G

Form GA-141
(7-20-43)

CIRCULAR SERIES SUPPLEMENT NO. 1 TO GENERAL PROGRAM CIRCULAR

No. 33.

Date: March 8, 1944

United States of America War Production Board

Page 1 of 3

To: All Bureau and Division Directors

Approved: J. A. Krug Program Vice Chairman
Issued through: L. M. Shea Esq. Office of Procedures

SUBJECT: CRITERIA FOR PREPARATION OF RECOMMENDATIONS FOR NECESSITY CERTIFICATES ON FORM GA-1231

Section 1 Purpose:

.01 The purpose of this supplement is to prescribe revised requirements for reports on applications for Necessity Certificates which are hereafter to be incorporated as part of Form GA-1231. These requirements are supplementary to the statement that was attached to memorandum to the Industry Divisions, War Production Board, and other interested Agencies from the Facilities Bureau Deputy Director for Tax Amortization, dated February 9, 1944, and are intended to clarify and expand it, but not to change it in any way. (See Page 3.)

.02 The new data is designed to furnish the information needed to make a decision on an application for a Necessity Certificate in most cases, but additional information may, from time to time, appear to the sponsor to be pertinent or be requested by members of the staff of the Tax Amortization Branch.

Section 2 Information to be furnished by Sponsoring Agency or Division on Form GA-1231:

.01 The following information must be supplied before applications for Necessity Certificates will be approved. Sponsoring agencies or industry divisions will be held responsible for the presentation of such data.

1. Is the end product of vital importance to the war effort? ..... If the answer is "Yes", state the basis for such a conclusion.

2. Is there an overall shortage of facilities to produce as against requirements for this product? ..... If so, explain.

3. If there is no overall shortage of facilities, is there an area shortage? ..... If so, state why it is imperative that the applicant increase production facilities rather than have the deficiency made up by another source.

4. Is acquisition or construction by the applicant of each facility listed clearly necessary for production of the end product? ..... Specify all facilities not clearly necessary.

5. Are these facilities wholly or partly a replacement? ..... If so, explain and state what part.

6. Are these facilities to be acquired from an affiliate? .....

7. Would the Government be in a good bargaining position after the War if these facilities should be publicly financed? ..... If not, state why.

8. Are they of a type that are likely to have a reasonable postwar value? ..... If not, state why.

9. Is it reasonable to assume that the facilities are of such a type that they may be useful to the applicant after the War? ..... If not, state why.

10. Comments:

11. Recommendations:

A. Based upon the foregoing it is recommended that the application be denied.

Signed .....

(over)

B. Based on the foregoing it is our opinion that it is to the advantage of the Government that the facilities be privately financed. In addition, recognizing the Government's financial interest in a certified facility, we are of the opinion that the facilities listed in Appendix A are so essential to the progress of the War that the issuance of a certificate up to .....% of cost is recommended.

Signed .....

Section 3 Effective Date for Required Information:

.01 The revised requirements for reports on applications for Necessity Certificates given in Section 2 are to be incorporated as a part of Form GA-1231. Whether the new forms are available or not, all reports from Sponsoring Agencies or Divisions, dated after March 10, 1944, must contain this information or they will be returned without action.

Section 4 Instruction for determining Recommendation on Form GA-1231:

.01 By applying the answers to the questions given in Section 2 and eventually to be included on Form GA-1231, one of the following recommendations should be made:

1. That no certificate should be issued.
2. That the facilities should be partially certified (state specific percentage recommended).
3. That facilities should be certified 100%.

.02 In the event that amortization should be allowed, determination as to whether it should be 100% or partial should be made as follows:

1. One hundred percent certificate will be given only when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use, and it is not reasonable to assume that they may be useful after the war.
2. Partial certificate representing excess construction or acquisition costs over pre-war costs* will be given when facilities to be amortized are wholly designed to manufacture end product exclusively for war purposes or for essential civilian use and it is reasonable to assume that they may be useful after the war.
3. Partial certificate will be given in appropriate percentages under certain other circumstances

* It is impossible to predict whether post-war costs will be above or below present costs, yet it appears equitable to relate them to pre-war costs. Accordingly, pre-war costs are to be used in determining this partial certificate, and as a general rule pre-war costs are to be considered as being those in effect during the years 1937-1939 inclusive.

of an extraordinary nature. The following are examples:

a. When part of the facilities are appropriate for government financing and part for a 100% certificate, a percentage certificate may be issued for the entire project at a percentage which will result in same amount of tax amortization that would have been allowed had the individual items been considered separately.

b. When a facility is a replacement, but a more expensive facility is required because of special war needs than would be required for normal operations of the Company, a percentage certificate may be issued covering the excess of the cost of the facility over the cost of the type of facility that would have been otherwise required.

c. When the facility is clearly necessary to the war effort, but its capacity or cost is in excess of that which is necessary for the war effort, the percentage should be determined in such a way as to make no amortization allowance applicable to the excess capacity or cost.

General Program Circular No. 33, Supp. No. 1
Page 3 of 3

Attachment to Memorandum, February 9, 1944

PREPARATION OF RECOMMENDATIONS FOR TAX AMORTIZATION

The Government's substantial monetary interest in facilities covered by a Necessity Certificate must be recognized. Amortization represents an abnormal tax

deduction and hence a loss of revenue to the Government. In the case of companies in the higher tax brackets, this may amount to 81 percent of the cost of the facilities.

No facility will be certified unless the war effort would actually be weakened by the lack thereof. This bears upon the degree of essentiality. The facility cannot be merely desirable, helpful or appropriate. It must be essential and must be required exclusively for production of one or more of the supplies enumerated in Section (3)(a) of the WPB Regulations governing the issuance of Necessity Certificates. An overall shortage of facilities in the industry or a situation covered by Section (3)(b)(ii) of the Regulations must be found to exist.

In determining whether it is to the advantage of the Government that the facilities be privately financed, consideration must be given to the probable marketability or useful value of the facility after the war. It is recognized that there is no way by which post-war value can be definitely determined at this time. Any facility which will not have a reasonably wide market value may be assumed to have relatively little post-war sales value, and therefore, it would be to the best interest of the Government that it be privately financed. On the other hand, if a facility appears to be of such a type that it would have a reasonably wide market after the war, it may generally be assumed that, provided the DPC or other government agency is willing to purchase it, it would be to the advantage of the Government that it be publicly rather than privately financed with a 100 percent certificate. It may still be advantageous to the Government to have private financing under a certificate if a certificate were issued, such percentage being

based, for example, on excess cost attributable to the war.

Reports must contain the findings required by Section (3)(b) of the Regulations, the most fundamental of which is the finding of an overall shortage of facilities required for the production of supplies necessary in the interest of national defense. Replacements, acquisitions from an affiliate, etc., must be commented on.

Reports must contain an expression of opinion whether it is to the advantage of the Government that the facilities be privately financed and must state the reasons. A favorable recommendation must contain a statement that, recognizing the Government's financial interest in a certified facility, the facilities listed in Appendix A are so essential to the progress of the war that the reporting agency recommends issuance of a certificate.

Reports must contain a statement of the percentage of cost recommended for certification.

Inquiries should be directed to the Tax Amortization Branch, Facilities Bureau.

* * * * * * * * *

[Caption omitted]

[Tr. 694-718] Filed March 14, 1955

Opinion

MURDOCK, *Judge:* The Commissioner determined deficiencies as follows:

Year	*Income tax*	*Excess profits tax*
1941	$32,196.29	....
1942	....	$1,426.59
1943	....	2,416,728.13
1944	91,026.81	1,032,315.21

All facts stipulated by the parties are adopted as findings of fact.

* * * * * * * * * *

[Portion of opinion dealing with other issues omitted]

War Facility Amortization

The petitioner acquired, dissolved, and, after June 30, 1944, carried on the business of the American Bearing Corporation. American Bearing had filed applications for certificates of necessity to cover the cost of constructing facilities for the purpose of producing war products. Certificates of necessity respecting those facilities were issued pursuant to section 124 of the Internal Revenue Code, stating that the facilities "are necessary in the interest of national defense during the emergency period, up to 50% [in some 35%] of the cost." The facilities were constructed. The purpose of the certificates was to permit the petitioner to amortize the cost of the additional facilities over a period of 60 months rather than recover their cost through depreciation deductions over the normal useful lives of the facilities. The petitioner claimed accelerated depreciation for the entire cost of the facilities, but the Commissioner limited the accelerated amortization to the percentages fixed in the certificates

of necessity. The petitioner contends that the percentage limitations which the certifying authorities purported to impose must be ignored because they are in violation of the words of and the intention of Congress behind section 124.

Section 124(a) provides that every person, at his election, shall be entitled to a deduction with respect to the amortization of the adjusted basis of any emergency facility based upon a period of 60 months. Subsection (e) defines emergency facility as "any facility, land, building, machinery, or equipment, or part thereof, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made." Section 124(f)(1) provides that in determining the adjusted basis of an emergency facility "there shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after December 31, 1939, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period" under regulations prescribed by the certifying authority with the approval of the President. The certificates in question were for construction after December 31, 1939, and it is conceded that the adjusted basis of that construction is cost.

The petitioner contends that the words "only so much of the" cost refer to construction after December 31, 1939, and that the provision may not be read "the cost attributable to so much of such construction as the certifying authority has certified as necessary in the interest of national defense during the emergency period." It says the certifying authority was to certify facilities, not costs.

The United States Graphite Company sought to compel the certifying authorities to issue certificates which would cover all rather than only part of the cost of facilities which it had constructed. The District Court for the District of Columbia dismissed the complaint. *United States Graphite Co.* v. *Harriman,* 71 F. Supp. 944. The Court of Appeals for the District of Columbia affirmed per curiam without opinion, but Judge Wilbur K. Miller filed a dissent in which he discussed the problem. *United States Graphite Co.* v. *Sawyer,* 176 F. 2d 868, certiorari denied 339 U.S. 904. That taxpayer then sued on a claim for refund of taxes in the Court of Claims on the ground that the percentage of cost limitation on its certificates should be ignored. The Court of Claims held for the taxpayer, and the Government did not seek a writ of certiorari. *Wickes Corp.* v. *United States,* 108 F. Supp. 616.

Judge Miller, in his dissenting opinion referred to above, considered and discussed the words used by Congress, the purpose which it sought to accomplish, and the legislative history of section 124. He stated, "After exhaustive study, I have been able to discover nothing in the language of the Act, or in its legislative history, to indicate that Congress intended to give the certifying agency the right to determine that only a portion of the cost of a necessary facility could be amortized." His interpretation of section 124(f)(1) was that it meant "there shall be included as amortizable cost only so much of the cost of the facility as is properly attributable to the part of it which was constructed after December 31, 1939, and which has been certified as necessary in the interest of national defense." The Court of Claims came to the same conclusion. This Court believes that the reasoning of

Judge Miller in his dissenting opinion and of the Court of Claims is sound and that a correct interpretation of the provisions of section 124 entitles the petitioner in this case to amortize the full cost of the facilities certified over the accelerated period.

Reviewed by the Court.

Decision will be entered under Rule 50.

OPPER, J., dissents on the last issue on the authority of *United States Graphite Co.* v. *Sawyer,* (C.A., D.C. Cir.) 176 F. 2d 868, certiorari denied 339 U.S. 904; and in consonance with the dissenting opinion of Chief Judge Jones in *Ohio Power Co.* v. *United States,* (Ct. Cl., Mar. 1, 1955) — F. Supp. —.

[Tr. 744]

[Caption omitted]

Decision

The parties filed an agreed computation on June 8, 1955, pursuant to the Court's Opinion filed March 14, 1955. Therefore, it is

ORDERED and DECIDED, that there are deficiencies in income tax for the years 1941 and 1944 in the amounts of $30,278.97 and $90,458.58, respectively; a deficiency in excess profits tax for the year 1944 in the amount of $686,726.81; an overpayment of excess profits tax for the year 1942 in the amount of $192,008.29, which amount was paid within two years before the execution of the agreement of April 9, 1946, and an overpayment of excess profits tax for the year 1943 in the amount of $582,669.71, which amount was paid within two years before the filing of the claim.

(Signed) J. E. MURDOCK
Judge

Entered June 17, 1955

[Tr. 745-746] Filed September 14, 1955

[Caption omitted]

Petition for Review

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

The Commissioner of Internal Revenue petitions the United States Court of Appeals for the Second Circuit to review the decision of The Tax Court of the United States, entered herein on June 17, 1955, pursuant to its Opinion filed March 14, 1955 (23 T.C. — No. 123), ordering and deciding "that there are deficiencies in income tax for the years 1941 and 1944 in the amounts of $30,278.97 and $90,458.58, respectively; a deficiency in excess profits tax for the year 1944 in the amount of $686,726.81; an overpayment of excess profits tax for the year 1942 in the amount of $192,008.29, which amount was paid within two years before the execution of the agreement of April 9, 1946, and an overpayment of excess profits tax for the year 1943 in the amount of $582,669.71, which amount was paid within two years before the filing of the claim."

This petition for review is filed pursuant to Sections 7482 and 7483 of the Internal Revenue Code of 1954.

The respondent on review is organized under the laws of the State of New Jersey and has its principal office in New York, New York, and filed its federal income and excess profits tax returns for the taxable years 1941, 1942, 1943 and 1944, the years involved herein, with the Collector of Internal Revenue (now District Director of Internal Revenue) for the Second District of New York, whose office is located at New York, New York, which collection district is within the jurisdiction of the United States Court of Appeals

for the Second Circuit, wherein this review is sought. This review involves deficiencies in income tax for the years 1941 and 1944, and deficiencies in excess profits tax for the years 1942, 1943 and 1944.

[Signatures omitted]

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Office - Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 124

NATIONAL LEAD COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

LAWRENCE S. LESSER
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INDEX

Page

FOREWORD 1

ARGUMENT

I. CONTRARY TO THE COMMISSIONER'S ASSUMPTION BOTH IN HIS STATEMENT OF THE QUESTIONS PRESENTED AND IN HIS ARGUMENT, THE STATUTE AUTHORIZED CERTIFICATION OF, AND THE BOARD CERTIFIED, "FACILITIES" AND NOT "COSTS" 3

A. Power to certify parts of facilities is not power to certify costs 3

B. The effect of amortization upon the revenues is not relevant to the issues here 6

C. The early regulations do not support the Commissioner 14

D. The Commissioner's interpretation, not the taxpayer's, leads to absurdity 17

II. THE CONGRESSIONAL PURPOSE IN ENACTING THE AMORTIZATION SCHEME WAS TO FOSTER INDUSTRIAL EXPANSION BY GRANTING AMORTIZATION TO FACILITIES REQUIRED DURING THE EMERGENCY WHETHER OR NOT THEY MIGHT BE USEFUL THEREAFTER, AND NOT, AS THE COMMISSIONER CONTENDS, TO FACILITIES USEFUL *Only* DURING THE EMERGENCY 22

A. In enacting the amortization provisions here involved, the Congress avoided the problem raised by the World War I provisions by eliminating all factors based on post-war utility and not by fixing the period, as the Commissioner claims 22

B. The Board's power is to be measured by the authority granted by the Congress and not by the authority not expressly withheld, as Commissioner claims 28

Page

III. The Commissioner's Contention That the War Production Board Did Not Find the Taxpayer's Facilities in Their Entirety to be "Necessary in the Interest of National Defense" Is in Direct Contradiction of His Own Consistent Prior Position 29

IV. In Contending That the Issue Here Cannot Be Decided by the Tax Court or the Court of Claims, the Commissioner Repudiates the Well-Settled Rule, Upon Which the Government Chiefly Relied in the *Graphite* Case, That Executive Discretion Cannot be Controlled by Mandamus 37

Conclusion 40

CITATIONS

Cases:

Adams v. *Nagle*, 303 U.S. 532 (1938) 38, 40
Commissioner v. *Gooch Milling & Elevator Company*, 320 U.S. 418 (1943) 28
National Lead Company, 23 T.C. 988 (1954, Docket No. 37694) 36
Riverside Oil Co. v. *Hitchcock*, 190 U.S. 316, 324-325 (1903) 40
Stark v. *Wickard*, 321 U.S. 288, 310 (1944) 28
United States Graphite Co. v. *Harriman*, 71 F. Supp. 944 (D.C.D.C., 1947), aff'd, *sub. nom. United States Graphite Co.* v. *Sawyer*, 176 F. (2d) 868 (C.A.D.C., 1949). cert. denied, 339 U.S. 904 ..... 23, 37, 38, 39, 40
Wilbur v. *U. S. ex rel. Kadrie*, 281 U.S. 206 (1930) 38
Work v. *Rives*, 267 U.S. 175, 183 (1925) 40

Statutes:

Internal Revenue Code of 1939:

Section 111 21
Section 113 ..... 15, 21
Section 113(b) 21
Section 124 ..... 8, 15, 21, 35, 38
Section 124(e)(1) 5, 15, 21

Page

Section 124(f) 5
Section 124(f)(1) 9, 15, 16
Section 124(i) 9

Joint Resolution of October 30, 1941, c. 464, 55 Stat. 757 ..... 9, 10, 14, 16
Second Revenue Act of 1940 ..... 14, 43

MISCELLANEOUS:

Briefs in this Court:

National Lead Company v. *Commissioner*, No. 988, October Term, 1955 ..... 31, 32
United States v. *The Allen-Bradley Company*, No. 923, October Term, 1955 ..... 31, 33
United States v. *The Ohio Power Company*, No. 312, October Term, 1955 ..... 29, 30, 31, 34
United States Graphite Co. v. *Sawyer*, No. 532, October Term, 1949 ..... 38, 40

Briefs in lower courts:

National Lead Company v. *Commissioner*, 1954, T.C. Docket No. 37694 36
United States Graphite Co. v. *Harriman*, 1947, D.C.D.C., Civil Action No. 36695 ..... 38, 39
United States Graphite Co. v. *Sawyer*, 1949, C.A.D.C., No. 9680 39

Hearings before Senate Committee on Finance, 76th Cong., 3d Sess., Sept. 3-5, 1940 38
H. Rept. No. 1207, 77th Cong., 1st Sess. 10
H. Rept. No. 2894, 76th Cong., 3d Sess. 7, 43
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Irving, *Knickerbocker History of New York*, Chap. IV 14
Joint Hearings before Committee on Ways and Means and Committee on Finance, 76th Cong., 3d Sess., Aug. 9-14, 1940 38
Paul, Randolph E., *Taxation in the United States* (1954) 25, 43
Plautus, *Mostellaria*, Act III, Scene 2 29

Page

1 Rosenman, *The Public Papers and Addresses of Franklin D. Roosevelt* (1938) 41, 42
S. Rept. 688, 77th Cong., 1st Sess. 11, 12
Treasury Regulations 103, Sec. 19.124-6 13
Treasury Regulations 111, 19.124-6 13
War and Navy Regulations, June 4, 1942, Section 5 ..... 14, 16, 17
War and Navy Department Regulations, October 8, 1943 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 124

NATIONAL LEAD COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONER

FOREWORD

The Commissioner's statement of the issue begs the question and his argument proceeds from a false premise to an untenable conclusion which would be no less untenable were his premise true. He grossly misconceives the legislative history, and in the guise of "reason", he imputes to the Congress a purpose and intent which fly in the teeth of what was said and done

at the time by Administration and Congressional sponsors of the bill. Neither last nor least, he espouses a doctrine, both novel and dangerous, upon which, in the final analysis, he is forced to rely, that the authority of an administrative agency is not measured by the powers granted to it by the Congress, but rather by the powers not expressly withheld.

We do not believe that the Administration and Congressional sponsors of the bill were either incompetents or cynics: We believe that they knew and truly said what their objectives were and how the bill would achieve them. We believe that the language of the bill as enacted into law, on analysis, is clear and unambiguous in carrying out what its sponsors intended. No "reasonable" assumptions drawn from thin air, no semantic jugglery and no missfatement of the issues or misconception of the legislative history, can refute the facts, redo the language, remake the issues, or rewrite the legislative history.

These are not mere hollow words, as an examination of what the Commissioner has said[1] will demonstrate.

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[1] The Commissioner's reply to our main brief is contained only partially in his brief in this case, for at page 12 of his brief he incorporates by reference the arguments made by the Government in its brief in the *Allen-Bradley* case, No. 78, this Term. Accordingly, we must refer to both briefs: References to the Commissioner's brief in this case are indicated by "Resp. B.", and references to the Government's brief in *Allen-Bradley* by "Govt. B.".

ARGUMENT

POINT I

CONTRARY TO THE COMMISSIONER'S ASSUMPTION BOTH IN HIS STATEMENT OF THE QUESTIONS PRESENTED AND IN HIS ARGUMENT, THE STATUTE AUTHORIZED CERTIFICATION OF, AND THE BOARD CERTIFIED, "FACILITIES" AND NOT "COSTS".

A. Power to certify parts of facilities is not power to certify costs.

The Commissioner says (Resp. B. 2) that the first issue is whether the Board

> had authority to certify only part of the cost of a new facility.

This clearly begs the question, for it necessarily assumes that the Board certified, and under the statute was to certify, "cost" as being necessary in the interest of national defense. But, as we have pointed out in our main brief (pp. 30-47) and as the certificates actually issued in this case witness (R. 8A, 8B), what the statute prescribed, and what the Board issued, were certificates that "facilities", not "costs", were necessary in the interest of national defense. The distinction is clear and the Commissioner's plight is obvious. For, if under the statute the Board's certificates were to relate to "costs" as being necessary in the interest of national defense, it is comparatively easy to justify, superficially at least, the certification of only the "war-induced" part of cost. But, if under the statute the Board's certificates were to relate to "facilities", rather than "costs", as being necessary in the interest of national defense, an administrative limitation on the statutory effect of the certificate to only the "war-induced" part of the cost of a certified facility cannot, as shown in our main brief (pp. 25-47), be justified even superficially.

The wholly false premise that "costs" rather than "facilities" were the subject of certification under the statute underlies the whole of the Commissioner's substantive argument. Throughout his briefs we find such phrases as: "only part of such *cost* was certified", "only part of the *cost* of a new facility was necessary", "only part of the *cost* of an emergency facility was certified as necessary", "certification of full *cost*", etc., etc., etc. (see, e.g., Resp. B. 7, 11, 12, 17; Govt. B. 7, 8, 12, 18). The falsity of his premise leads the Commissioner into curious paths. Thus, he says (Resp. B. 13):

> Where there were "facilities of a size or capacity greater than was necessary in the interest of national defense, or where the facilities certified were to be used only partially for defense production", the taxpayer recognizes that partial certificates were issued, and were contemplated by the applicable, contemporaneous Treasury Regulations. (Br. 46.) But, the taxpayer argues, partial certificates in these situations were different from partial certificates which were designed to preclude amortization of a portion of the costs of facilities which would have a post-war use. (Br. 46-47.)
>
> But, once it is admitted that Section 124 is broad enough to empower the Board to issue some kind of partial certificates, it follows that it had authority to issue partial certificates in any situation, for there is nothing in the statute which draws the distinctions being made by the taxpayer or which authorizes the issuance of partial certificates in some situations and denies it in others. Indeed, the Board's authority to issue a partial certificate in any situation would have to come from the "only so much of" phrase of Section 124(f).

The sheer absurdity of this argument and the conclusion reached is manifest from the very language of the statute itself, which *expressly* authorizes the certification of *part of a facility*. Thus, section 124(e)(1) provides:

> As used in this section, the term "emergency facility" means any facility, land, building, machinery, or equipment, *or part thereof*, the construction, reconstruction, erection, installation, or acquisition of which was completed after December 31, 1939, and with respect to which a certificate under subsection (f) has been made. * * * (Emphasis supplied.)

Clearly, the Commissioner's assertion that "the Board's authority to issue a partial certificate in any situation would have to come from the 'only so much of' phrase of Section 124(f)" is completely without basis.

Obviously, the "partial certification" contemplated by the statute is the certification of a part, say, of a plot of land, sufficient, but no more than sufficient, for the needs of a necessary plant; of a part, say, of a building, sufficient, but no more than sufficient, for the installation of a necessary production line; of a part, say, of an aggregation of machinery and equipment, sufficient, but no more than sufficient, for the production of necessary materiel. Partial certification contemplates the certification of the necessary, and noncertification of the unnecessary;[2] certification of the essential item and noncertification of the luxury item.[3]

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[2] E.g., in a manufacturing plant machine tools would be necessary, but an office air conditioning system would not be (R. 35-36).

[3] "* * * electric signs, glass desk tops, ping pong tables, pool tables, and soda fountains * * *" (R. 35).

To say that the statute contemplated that "partial certification" was to be in terms of cost is sheer distortion of the plain language of the statute.

B. The effect of amortization upon the revenues is not relevant to the issues here.

A constant theme of the Commissioner is the supposed cost to the Government of the amortization program considered in terms of "lost" revenue in general and in respect of particular taxpayers.[4] Thus, the Commissioner says (Govt. B. 18) that:

> * * * Where the construction of the facilities was financed by private funds, the granting of rapid amortization had the effect of *indirect* government financing to the extent that a corresponding reduction in taxes was achieved during a period when a high tax rate was being imposed. * * *

and (Govt. B. 19) that:

> Although the amortization provisions were nominally a part of the revenue laws, the function of determining what facilities should be entitled to receive the benefits of the statute was delegated to the executive officials primarily responsible for controlling the development of the defense program, presumably on the theory that they were best able to weigh the necessity of particular facilities in the light of all surrounding circumstances, including the cost to the Government resulting from certification. * * *

Of course, the over-all effect of the amortization scheme would have been to reduce tax revenues below

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[4] In our main brief, pp. 47-52, we attempted to place this subject in proper perspective by orienting attention to the circumstances surrounding the enactment of the statute.

what they might have been *if* the same facilities had been built without it, *if* those facilities had produced the same profits and *if* the same tax rates had applied to those profits. On this "iffy" assumption of constant factors, amortization can of course be made to appear as a drain upon the revenues. But can it be fairly assumed that without amortization, the same plants would have been built, the same profits would have been earned, and the same tax rates would have been applied? Clearly not, for as we pointed out in our main brief (pp. 47-52), the amortization provisions of the Internal Revenue Code were enacted for the express purpose of overcoming the unwillingness in 1940 of private enterprise to risk the tremendous investment required to create the enormous additional productive capacity so urgently needed then, but whose post-war usefulness was at best dubious.[5] Moreover, is it not also fair to conclude that the amortization scheme, which helped bring about the tremendous industrial expansion which eventually made possible the winning of the war, thereby was itself an important factor in the amazing productivity of the wartime tax structure?

Furthermore, from the vantage point of 1956, it may seem at first glance that the "cost" to the Government, of any particular facility, in terms of lost revenues because of the availability of amortization deductions, might have been estimated with fair accuracy at the time application was made for a certificate. The contrary is the fact.[6] A certificate did

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[5] See, e.g., H. Rept. No. 2333, 76th Cong., 3d Sess., p. 16, quoted at p. 50 of our main brief. See also pp. 40-43, *infra*.

[6] Consider: This case involves the income and excess profits tax liability of the National Lead Company for the calendar years

not guarantee, or limit, either the cost of the plant or the cost of manufacture; a certificate did not guarantee a market, or a price; in short, a certificate was no assurance of profits, and did not, willy-nilly, affect tax liability. With all the uncertainties that necessarily prevailed, any estimate of the future income and future tax liability of any particular taxpayer,[7] much less with respect to any particular facility, was a virtual impossibility; yet nothing less would have permitted even a guess as to the "cost" to the Government of the certification of a facility.

It is true that at the outset, Congress incorporated into section 124 a provision designed to protect the

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1941-1944. Some $6,000,000 or more in claimed deficiencies and overpayments for those years were in issue before the Tax Court. One of those issues is now, in late 1956, before this Court. How could the War Production Board, no matter how able its staff, have fairly estimated, in 1944, the "cost" of the facilities here involved in terms of "lost" revenues?

[7] The Commissioner cites an example of the possible loss of revenue in the case of a facility having full post-emergency utility (Govt. B. 28, n. 12). Under the assumed facts, the "loss of revenue" would be $450,000. But, the coin has another side.

For simplicity, we assume, as does the Commissioner, that the maximum tax in the five-year emergency period was 85%, and that the facility has a 20-year life. But it must be remembered that the World War II corporate normal tax rate was 40%, and that the post-war tax rate has not been 25%, as the Commissioner seems to suggest, but 38% in 1946-1949, and 52% since 1950 (with an additional 30% excess profits tax in 1950-1953, where applicable).

Corporations which did not pay excess profits taxes in World War II were not rarities. Moreover, many of them received and took advantage of necessity certificates, for the decision as to whether or not to do so had to be made then. Such a corporation would have yielded to the Treasury at least $62,000 more in aggregate tax revenues, over the 20 years of the facility's life, by electing to take amortization deductions, rather than relying on normal depreciation.

financial interest of the Government in each facility. This was section 124(i), relating to nonreimbursement and Government protection. This scheme proved unworkable, and was repealed soon after Pearl Harbor (R. 30). The Commissioner points to no one, either in Congress or in the executive departments, who expressed the view that the cost of the program was to be controlled by certifying *costs* of facilities. It is, indeed, not too much to say that the cost of the program was considered by those charged with the responsibility in the premises as being wholly irrelevant to the need for the facilities. Yet, with all apparent seriousness, the Commissioner claims that it was "with this very cost in mind", that is, the cost of the amortization program in terms of lost revenues, that Congress enacted the Joint Resolution of October 30, 1941, amending section 124 of the Internal Revenue Code. The Commissioner argues (Govt. B. 10, 11):

> The view * * * that the certifying authority was required to issue 100% certificates or none at all is based on the premise that Congress intended that the cost of the certification program, in lost revenue, to the Government could not properly be taken into consideration in the issuance of necessity certificates with respect to post-1939 construction of emergency facilities. But it was with this very cost in mind that Congress amended the statute on October 30, 1941, to require the President's approval of regulations to be issued governing the issuance of necessity certificates, and the regulations so approved expressly provided for percentage certifications.

But the legislative history of the amendment flatly refutes the Commissioner's unsupported statement of its purpose. The amendment was of section 124(f)(1) which, as originally enacted, read:

> There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after June 10, 1940, as the Advisory Commission to the Council of National Defense and either the Secretary of War or the Secretary of the Navy have certified, within the time specified in paragraph (3) of this subsection, *and under such regulations as the President may prescribe,* as necessary in the interest of national defense during the emergency * * *; (Emphasis supplied.)

As noted in our main brief (p. 41, n. 16), one of the purposes of the October 30, 1941 amendment was to eliminate the Council of National Defense as a necessary co-certifying agency with the War or Navy Departments, as the case might be. In explanation of the amendment as originally introduced in the House of Representatives, the House Ways and Means Committee said in its Report (H. Rept. 1207, 77th Cong., 1st Sess.):

> Section 1 of the joint resolution proposes to strike out the requirement in the existing law that the Advisory Commission to the Council of National Defense act as a joint certifying agency for necessity certificates. When the present law was enacted, the Advisory Commission to the Council of National Defense was an active functioning body. At the present time, its other functions have been taken over by other governmental agencies. The War Department and the Navy Department are presently equipped to act upon applications for amortization privileges, and have secured the cooperation and assistance of other governmental agencies. Experience has shown that considerable uncertainty and delay is created by the necessity for joint action of two

governmental agencies in passing upon applications for certification.

In lieu of required action by the Advisory Commission, it is now proposed that certifications be made only by the Secretary of War or the Secretary of the Navy, as the case may be, but *under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy and subject to such policies and procedures as may be prescribed from time to time by the President or by such agency or officer as he may designate. It is thought that by this means control of the policy and procedure as to certification for tax purposes will be as effective as previously provided by requiring joint certification by the Advisory Commission with the Secretary of War or the Secretary of the Navy, but without the inherent delay resulting from duplication of effort by requiring in each case an agency outside of the Army or Navy to join in the certification.* (Emphasis supplied.)

The Senate Finance Committee, however, thought that the House provision was too clumsy and proposed (S. Rept. 688, 77th Cong., 1st Sess.) that the words "and subject to such policies and procedures as may be prescribed from time to time by the President, or by such agency or officer as he may designate", appearing after the words "under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy", be eliminated and that there be inserted in lieu thereof the words "with the approval of the President". In explanation, the Senate Report said:

In lieu of required action by the Advisory Commission, it is now proposed that certifications be made only by the Secretary of War or the Secre-

> tary of the Navy, as the case may be, but under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy. Under the House language, such regulations were to be subject to such policies and procedures as may be prescribed from time to time by the President or by such agency or officer as he may designate. * * * your committee, *in the interest of simplification, struck out the House provision and amended the resolution to provide that such regulations shall be subject to the approval of the President. It is thought that by this means control of the policy and procedure as to certification for tax purposes will be as effective as previously provided by requiring joint certification by the Advisory Commission with the Secretary of War or the Secretary of the Navy, but without the inherent delay resulting from duplication of effort by requiring in each case an agency outside of the Army or Navy to join in the certification.* (Emphasis supplied.)

We fail to see how this amendment (the Senate version prevailed) has any relation to "this very cost" (Govt. B. 11), as the Commissioner calls it, or confirms, as the Commissioner says, that "Congress intended to confer a wide latitude of administrative discretion" (Govt. B. 38), for most agencies can promulgate regulations without the approval of the President. Indeed, the Congressional comments cited by the Commissioner (Govt. B. 39) confirm that it was the purpose of Congress not to give the certifying agencies latitude, but to keep them quite firmly in check. Moreover, it is clear that the amendment added nothing to the power of the executive to promulgate regulations under the act, merely substituting as it did the Secretary of War and the Secretary of the Navy, with the approval

of the President, as the rule-making authority, in the place of the President.

Any faithful presentation of the legislative history,[8] will demonstrate that in enacting the amortization provisions of the Internal Revenue Code, nothing but the success of the defense program, in terms of getting

[8] Just as he misconceives the legislative history and misunderstands the Congressional purpose, the Commissioner "interprets" out of all recognition the purport of the Treasury Regulations. Of those Regulations (Sec. 19.124-6, Reg. 111, printed at pp. 77-79, Appendix A, Govt. B., which replaced Sec. 19.124-6, Reg. 103, without substantive change), the Commissioner says (Govt. B. 37):

> The contemporaneous administrative construction of the statute shows an understanding of the legislation which is completely at variance with that of the [Court of Claims]. * * * Section 19.124-6 * * * explicitly demonstrated that the adjusted basis for the amortization deduction would not only be limited to the portion of the basis attributable to construction after June 10, 1940 * * * but would be further limited if the appropriate officials "certif[y] only *a portion of the construction* * * * *".* Two examples given in the Regulations made it crystal clear that such a dual limitation existed and that, *even as to post-[critical date] costs,* only a portion might be certified * * *. (Emphasis supplied.)

The examples in the Regulations speak plainly of one certificate covering "the entire construction" after the critical date, and another covering "50 percent of the construction". So again, as so often in examining the Commissioner's argument, we must remind ourselves that the ordinary and accepted meaning of words is apparently not his. In his lexicon, "construction" and "cost" are synonymous and interchangeable, and that is enough; therefore when the Treasury Regulations speak of "portion of construction" they mean, of course, "portion of cost".

Similarly, the Regulations promulgated by the certifying agencies constantly refer to facilities, to their necessity, and to their certification. None of those Regulations support the thesis that costs were to be, or were being, certified.

the necessary facilities built and in operation, was the Congressional purpose.[9] None of the Administration or Congressional leaders who sponsored the act and the amendments thereto was, as Washington Irving said of William the Testy, "so intent upon guarding the national pocket * * * that * * * whatever precaution for public safety he adopted, he was so intent upon rendering it cheap, that he invariably rendered it ineffectual". *Knickerbocker History of New York,* Chap. IV.

C. The early regulations do not support the Commissioner.

The Commissioner appears somehow to find comfort and support for his views as to the purpose, meaning, and effect of the October 30, 1941 amendment in early regulations adopted thereunder (Govt. B. 11) and points (Govt. B. 40) specifically to Section 5 of the War and Navy Department regulations of June 4, 1942, approved by the President, providing as follows:

> 5. *Effect of Necessity Certificate.*
>
> a. *General Rule.* A necessity certificate is conclusive evidence of certification by the certifying authority that the facilities therein described are necessary in the interest of national defense, up to the percentage therein designated of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof after June 10, 1940.

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[9] Concededly, of course, Congress was at the same time concerned with unusual profits which would be occasioned by the war, but it dealt with this problem by enacting the excess-profits tax. It is significant that the excess-profits tax amendment and the amortization amendment to the Internal Revenue Code were dealt with by the Congressional committees concerned as a "package", and both were included in the Second Revenue Act of 1940. See our main brief, pp. 47-52.

This, the Commissioner maintains (Govt. B. 40), is

> express recognition that the statute entrusted authority to certify only a percentage of the cost attributable to construction after the critical date * * *.

Taken literally, the Commissioner's contention is largely unobjectionable. For, as we have seen, under section 124(e)(1), set out at p. 5, *supra,* the certifying agency could properly certify as being necessary *only part of a facility* where, for example, the facility as a whole was excessive in size, capacity, or adornment, or only part thereof was intended for war production. With section 124(e)(1) in mind (and it is clear that the Commissioner overlooked it, see pp. 4, 5, *supra,* and pp. 19-21, *infra*), it becomes at once apparent that the language of the regulation, and of those that followed it *in haec verba,* means no more than that in such a case of partial certification, the certifying agency would indicate on the certificate the percentage of the cost[10] of the whole facility that was "properly attributable", within the meaning of section 124(f)(1), to that part of the facility found to be necessary and that the facility was to be deemed to have been certified to that extent. Thus, Under Secretary Patterson posed the example (R. 38):

> In an early case, a building had been erected to produce 70% peacetime products and 30% war products. A 30% certificate was granted.

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[10] As we pointed out in our main brief, p. 30, "cost" and "adjusted basis", the term used in section 124, were in most cases, as in this, the same. In any event, "cost" is the basic element in determining "adjusted basis". See section 113 of the Internal Revenue Code of 1939.

We take the example to mean that 30% *of the facility* was determined to be necessary in that case. If the determination made was that an undivided (or unidentified) 30% *of the facility* was necessary, it might be perfectly natural to attribute 30% of the cost of the whole to the necessary part. But the per-unit cost of productive capacity does not always vary in direct proportion to increased capacity. In such a case as, for example, where 30% of the capacity of a facility was necessary, but only 20% of the cost of the whole facility was "properly attributable" to that capacity, a certificate reading "up to 20% of the cost", etc., would merely be a convenient and realistic means of reflecting the certifying agency's effective determination.

But, whatever purpose the clause in question was intended to serve when the 1942 regulations were promulgated, it was not to reflect a Congressional mandate arising from the October 30, 1941 amendment to section 124(f)(1) that "the cost of the certification program, in lost revenue, to the Government * * * be taken into consideration in the issuance of necessity certificates" (Govt. B. 10). For, as we have seen, not only was there no such mandate, but there was not even the slightest suggestion of any such thought which, in any event, would have been wholly irrelevant to the circumstances, purposes, and nature of the amendment.

Nor did the clause in question reflect any understanding on the part of the Secretaries of War and the Navy, or the President, that the statute authorized the certifying agencies to limit the amortization of the cost of a necessary facility having possible post-war usefulness to the percentage of cost attributable to excess war cost, if that is what the Commissioner would imply (Govt. B. 40, quoted p. 15, *supra*). This is

clear since the clause first appeared in June 1942, and certification on that basis was apparently first considered only sometime after October 8, 1943, when the Secretaries of War and the Navy, with the approval of the President, promulgated the last of their regulations referred to by the Commissioner (Govt. B. 21; R. 39, 40) which did not provide for such certification, and prior to February 9, 1944, when, after the intervening transfer of the certifying authority, the Board adopted the certification policy here in issue (see our main brief, pp. 25-27). But the problem which allegedly led to the adoption of the policy was already acute in the Spring of 1943 (Govt. B. 20; R. 38) and the Director of War Mobilization's solution of it, set out in the service departments' regulations of October 8, 1943, was that "further certification * * * should be made only in cases of facilities for a supply for military or naval uses, and then only after consideration of the relative advantage of governmental financing as against private financing with amortization" (R. 40). This was considered the alternative to abandoning the certification program altogether (R. 38-40). If partial certification in terms of excess war costs and post-war usefulness had been contemplated by the 1942 regulations, would it have been so long before such a program was adopted as a solution to the problem?

D. The Commissioner's interpretation, not the taxpayer's, leads to absurdity.

With a fecundity which is at once astounding and frightening, the Commissioner materializes a host of arguments, plausible enough syntactically, but which, on analysis, have neither logic nor reason, nor foundation in the statute. Thus, for example, he argues

(Govt. B. 33, 34) that if the Board did not have the power here contended for

> it would have no authority to limit the amount of cost which would become the basis for the amortization deduction. In other words, the Government would never have any assurance, once a certificate was issued, of what costs would become deductible through amortization.

But costs, except insofar as already expended, were of necessity in every case an unknown factor at the time of certification. Estimates had no binding quality. The Board did not pretend to issue certificates which purported to limit amortizable cost in terms of dollars and cents. The amount of amortizable cost necessarily remained unknown until the emergency facility was completed and its cost became a fact.

But this is not all. Certainly the Commissioner knows, as every schoolboy soon learns, that a percentage of an unknown amount is itself an unknown amount. Just how, then, the certification of a percentage of cost could have given the Government the assurance of which the Commissioner speaks must remain a mystery. Frankly, it is difficult to know what to make of this argument of the Commissioner, for the situation differs not a whit from that which surrounds the allowance for depreciation, with which the Commissioner is, of course, familiar. The cost to the Government of allowances for depreciation does, and must, remain unknown until the returns are in and the depreciable costs claimed have been checked and audited.

The Commissioner's claim (Govt. B. 33, 34) that the taxpayer's interpretation of the statute would lead

to absurd results is itself absurd. His hypothetical case of an application filed in 1943 for a plant estimated to cost $1,000,000, and certified "for 100% of cost, limited to one million dollars" (Govt. B. 33) posits an unreality. For, neither the War Production Board nor any of its predecessor certifying authorities ever undertook to control the *amount* of the cost of a facility[11] or to make a certification in terms of dollars and cents.

And again, when the Commissioner supposes (Govt. B. 34)

> a situation where, on the face of the application, it is clear that an indivisible portion of the plant will be useful for non-essential civilian production and that only the remaining indivisible portion will be useful for essential war production

he departs from reality. For while some facilities may be unitary and thus physically indivisible, no facility could possibly be indivisible in terms of size, capacity, or function; and there is no problem of "partial necessity" which could not have been resolved by certification of a part, a portion, a fraction, or even a percentage, of the facility.

The Commissioner's argument becomes confusion compounded when, in support of his thesis that in certifying a facility as necessary in the interest of national defense, the Board could limit the statutory effect of such certification to only the war-induced cost of the certified facility, he says (Govt. B. 34, 35):

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[11] As Under Secretary Patterson said: "The cost of a facility was in general considered a matter in the discretion of the applicant so that if the facility was appropriate and necessary, inquiry was not made as to whether it was purchased or constructed for the lowest possible price * * *." (R. 36)

Congress could scarcely have desired that certificates of necessity should represent blank checks, with the taxpayer entitled to amortize full costs of construction, no matter how much they exceeded the prior estimates contained in the application for the certificate. And where the proposed facility was designed to produce, in part, items of absolute necessity to the nation's defense and, in part, unnecessary civilian items, it is difficult to believe that Congress desired either that the entire cost of the plant should be certified or that no certificate should be issued, with the consequence that the necessary part of the production might be unavailable from privately owned plants.

As for the first part of this argument: As already pointed out, the estimates given in applying for certificates were just that, estimates and nothing else. The Commissioner knows (or should know) better than anyone else, that amortization, like depreciation, pertains to actual costs, not estimated costs. Thus, if actual costs proved in a particular case to be less than estimated costs, the Commissioner would be far in the van in asserting that actual costs alone could be amortized. By the same token, if costs proved to be underestimated, it was nevertheless *cost,* not estimated cost, that was to be amortized. The fallacy of the Commissioner's argument is doubly emphasized when one recalls that while the general objective during the war was to "freeze" prices and wages, nevertheless, an essential feature of the control system was flexibility. The system had safety valves; when pressures became too great, the Government permitted both prices and wages to be adjusted upwards. Surely, taxpayers constructing necessary facilities were not to be bound by estimates made when one price and wage level prevailed, when the Government itself later

authorized the higher levels that were determinative of actual cost.

Moreover, if the amortizable amount is to be "estimated cost", not "actual cost", the pertinent provisions of the Internal Revenue Code lose their precision; taxpayers must tread a quagmire rather than firm ground. Section 124 provides for the amortization of "adjusted basis"; section 113 defines "adjusted basis" as "cost",[12] not "estimated cost"; and section 111 provides, for example, that taxable gain upon a sale of property shall be the excess of the amount received over the "adjusted basis". Does the Commissioner really mean to suggest that in section 124 "adjusted basis" means "estimated cost", and in section 113, "actual cost"? Would he maintain, also, that under section 111 gain or loss from the sale of a certified facility is to be computed from the starting point of estimated costs rather than actual costs?

The second part of the above-quoted argument has already been answered (pp. 3-6; 15, *supra*). It lies, in short, in the three words "or part thereof" contained in the pertinent language of the statutory definition of section 124(e)(1) of an emergency facility as

> any facility * * * *or part thereof* * * * with respect to which a certificate under subsection (f) has been made. * * * (Emphasis supplied.)

Accordingly, the strained and strange construction of the statute which the Commissioner contends for is not necessary even to avoid the horrible situations which he postulates.

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[12] Adjusted, as prescribed by section 113(b), in respects not material here.

POINT II

THE CONGRESSIONAL PURPOSE IN ENACTING THE AMORTIZATION SCHEME WAS TO FOSTER INDUSTRIAL EXPANSION BY GRANTING AMORTIZATION TO FACILITIES REQUIRED DURING THE EMERGENCY WHETHER OR NOT THEY MIGHT BE USEFUL THEREAFTER, AND NOT, AS THE COMMISSIONER CONTENDS, TO FACILITIES USEFUL *ONLY* DURING THE EMERGENCY.

A. In enacting the amortization provisions here involved, the Congress avoided the problem raised by the World War I provisions by eliminating all factors based on post-war utility and not by fixing the period, as the Commissioner claims.

The Commissioner asserts that in enacting the amortization provisions of the Internal Revenue Code, the Congress was concerned with usefulness *only* during the emergency. Thus, he says (Govt. B. 15):

> * * * plant facilities of the kind needed by the Government could be expected to earn income only during the emergency period * * *.[13]

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[13] See also Govt. B. 42, n. 19. The Commissioner's theory is, in effect, that since the normal cost of a facility having post-war utility will presumably be recovered by means of normal depreciation deductions, amortization was intended as a substitute, not for depreciation deductions covering the entire cost, but only for those deductions, equivalent in the aggregate to the "excess war cost", which normal depreciation deductions could not return to the taxpayer during the emergency. Consider this theory in application to land. Land, presumably, always has utility; in other words, there can be no doubt as to its post-war utility. But, the normal cost of land is never recoverable through depreciation deductions. If the allowable amortization was to be no more than a *pro tanto* substitute for *depreciation of excess war cost* the result would be no amortization for land, no matter how necessary in the interest of national defense, a result which would be contrary to the express provisions of the statute.

In a sense the Commissioner is right. The Congressional objective was to lessen the risks involved in building industrial facilities to produce items urgently needed for defense, and thereby to encourage the construction and expansion of facilities having usefulness *during* the emergency. But, whether such a plant or such expansion could, would, or might be useful or useless in the post-war period had no relevancy to the Congressional purpose. As we have already shown,[14] Congress intended that full amortization be available for facilities and parts of facilities needed for defense *whether or not* they might be useful after the war.

The Commissioner says (Govt. B. 44, n. 20) that Judge Miller, dissenting in the *Graphite* case, 176 F. (2d) 868 (1949),

> was undoubtedly correct when he stated that Congress, in enacting Section 124, wanted to avoid the problems encountered under the World War I amortization law.

The Commissioner concludes that the World War I problem was avoided by the World War II law.[15] With this generality we agree, but the Commissioner obscures the nature of the World War I problem and designates as the World War II solution, a feature of the law which was totally irrelevant to the problem and to its solution.

Let us examine this argument of the Commissioner. After conceding that Judge Miller was correct in stating the desire of Congress to avoid the World

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[14] See pp. 30-42 of our main brief.

[15] Govt. B. 44, n. 20.

War I problem, the Commissioner (Govt. B. 44, n. 20) proceeds:

> But he [Judge Miller] was not wholly accurate when he implied that the principal problem there encountered was that of taking into account the post-war value of facilities.

Can the Commissioner, whose predecessors suffered so with it, be heard to deny that post-war value was the "principal problem" under the World War I law?[16] Yet, he goes on—

> Rather the problem was that the 1918 statute, while based on a loss of useful value, did not prescribe the *amount* to be amortized in advance, and therefore great uncertainty prevailed * * *. (Emphasis supplied.)

Then we are told that the World War I defect of failure to prescribe the *amount* to be amortized in advance was corrected in the World War II statute by fixing a *period*:

> * * * it is generally agreed that this problem was avoided in the World War II statute by fixing an arbitrary maximum period during which the certified costs [sic] could be fully amortized.

Obviously, the World War I amortization law involved two factors. The first was, indeed, the "amount", that is, the portion of the cost attributable to the useful value lost by the ending of the emergency—and *that* was the troublesome problem indeed, involving as it necessarily did, post-war usefulness and value. The second factor was the "period". This was no problem, primarily because the war was already

[16] See the discussion of the World War I problem set out in Under Secretary of War Patterson's report at R. 23.

over when the law was passed. So, too, the World War II law involved two factors. The first was again the "amount", and this time the Congress solved that problem by prescribing that the "adjusted basis", i.e., the cost, of the certified facility or certified part of a facility could be amortized. The determination of the second factor, the period,[17] cannot conceivably be regarded as having solved the problem of "amount". What solved it was leaving out of the statute the uncertain post-war use element which was the troublesome factor under the World War I provisions.

Congress did not write the post-war use concept of the World War I law[18] into the World War II amor-

[17] The actual length of the period was to remain an open question until September 29, 1945.

[18] The late Randolph E. Paul, Special Tax Consultant to the President and the Treasury in the period 1937-41 and while the Second Revenue Bill of 1940, including its amortization provisions, was prepared, introduced, considered and passed, and General Counsel for the Treasury in the period 1942-44, clearly put the differences between the World War I and the World War II amortization provisions in his descriptions of them. Thus, in Paul, *Taxation in the United States* (1954) 119 he wrote:

> The 1918 act contained • • • [a] provision allow[ing] a deduction for amortization • • •. The fundamental theory of the amortization provision was that a taxpayer who enlarged plants, engaged in the production of war material and equipment at the high prices prevalent during the war, which plants or equipment would be more or less useless in the ordinary business, should not suffer from the necessity of paying a tax on income, the production of which required a substantial property investment at inflated prices.

Of the World War II Act, he wrote, *id.*, 264, that it

> allowed a deduction for income and excess profits tax purposes on account of the amortization of facilities certified • • • as necessary • • •. [It] permitted the write-off of the facilities over a period of sixty months instead of the longer normal depreciation period.

tization law, and the legislative history is clear that there was no purpose to do so (see our main brief, pp. 30-52). That ghost was raised, not by Congress, but by the War Production Board. In attempting to limit amortization in the case of facilities considered to have "post-war use", the Board disregarded the Congressional solution of the World War I problem, which was to eliminate the factor which gave rise to it, and undertook to inject into the administration of what was intended to be but a part of the normally matter-of-fact tax laws, an element of necromancy and clairvoyance. Obviously, "use" in "post-war use" must mean *economic* and not physical use (cf. Govt. B. 15), for it is difficult, if not impossible, to imagine anything ever having no use at all. Even after the glory that was ancient Rome's had failed, and the circuses and games were no more, the Colosseum served for centuries as a quarry whence came the foundation stones and walls of lowly hovels and proud palaces. But whether an emergency facility would have *economic* use in the post-war period necessarily depended on what economic conditions *would be* in the post-war period.[19]

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[19] The Commissioner says that (Govt. B. 23):

> • • • any facility with clear post-war value could, if Government-financed, be readily disposed of at the end of the war • • •.

This is typical of the fashion in which the Commissioner disposes of so many difficult problems. When would post-war value be "clear"—when the facilities were examined for certification; or after the war, when the nature and extent of post-war civilian demand could be equated with the capacity and function of the facilities, and all other like facilities? Moreover, how could anyone predict that a facility, if Government financed, could be "readily disposed of at the end of the war"? Does this mean that we were not to have, and did not have, after the war, any problem of surplus plant capacity in the hands of the Government?

Now, the Board may have been optimistic and its optimism may, on the whole, have been *proven* by future events to have been justified, but at the times when the policy was adopted and was being pursued, the future was far from clear. As we have shown in our main brief (p. 51), in October 1944 the President, in December 1944 the War Contracts Subcommittee of the Senate Military Affairs Committee, and in September 1945 the Senate Committee on Banking and Currency, publicly took dim views of the post-war economic period—*unless something were done to cause peace-time consumption to match war-induced capacities to produce.* And the "*unless*" continued to be an unknown quantity for some time. Suppose events had not taken the turn they did, or that our Administration and Congressional leaders had lacked the vision and the imagination to hitch the force of their turn to our economic mill wheel; then, of course, the Board's optimism might have proven wrong. Were the inducements to build and expand facilities to meet the demands of war, and the protection against the risk involved, which the statute held forth, to be granted or withheld only as the Board read its crystal ball? And if so, would the Board's attempted limitation of amortizable costs to war-induced costs on the ground of "post-war use" still hold if, as a matter of fact, the facility turned out to have no post-war economic use?[20] Certainly, neither such flimsy nor whimsey has any place in the law or its administration.

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[20] The amortization scheme made no provision for appeal and review, and no practicable system of review would have contributed to the objective of getting plants into production. It is one thing for the administrator to make final decisions as to necessity; it is quite another for him to make final decisions as to post-war usefulness and excess war costs. Simple fairness would demand reviewability of the latter.

B. The Board's power is to be measured by the authority granted by the Congress and not by the authority not expressly withheld, as the Commissioner claims.

But it is not necessary for the taxpayer to challenge the wisdom of the War Production Board's policy, any more than it is necessary for the Commissioner to defend it. Whether it was wise or not is not in issue. The issue is one of power. The power of an administrative agency is delineated by Congress, and only by Congress. An unwise decision does not lessen the power granted by the Congress to an administrative agency, nor does a wise decision generate power in an administrative agency where the Congress has granted none. These principles would appear to be elementary and fundamental. Yet, the Commissioner says that the power which the War Production Board assumed to exercise existed because (Govt. B. 28)—

> * * * Congress did not say that these agencies should be *precluded* from determining that only a part of the cost of a defense facility was "necessary in the interest of national defense". (Emphasis supplied.)

We do not believe that the power of an administrative agency is to be gauged by what Congress has not forbidden it to do, rather than by what Congress has authorized and directed it to do. As Mr. Justice Reed said for this Court in *Stark* v. *Wickard*, 321 U.S. 288, 310 (1944):

> When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.

See also *Commissioner* v. *Gooch Milling & Elevator Company*, 320 U.S. 418 (1943).

POINT III

THE COMMISSIONER'S CONTENTION THAT THE WAR PRODUCTION BOARD DID NOT FIND THE TAXPAYER'S FACILITIES IN THEIR ENTIRETY TO BE "NECESSARY IN THE INTEREST OF NATIONAL DEFENSE" IS IN DIRECT CONTRADICTION OF HIS OWN CONSISTENT PRIOR POSITION.

While it is not easy to blow and swallow at the same time, to borrow Plautus' classical understatement (*Mostellaria,* Act III, Scene 2), the Commissioner seems to have achieved that impossible feat. Thus, when in *Ohio Power,* No. 312, last Term, the Government moved for leave to file a petition for rehearing of its petition for a writ of certiorari upon the ground, among others, that a petition for a writ of certiorari would be filed in this case by the taxpayer, the Ohio Power Company contended on brief (pp. 15-17) that the two cases were distinguishable and did not present a conflict, arguing:

> The key to the important differences between these two cases is found in two different bases on which the War Production Board acted in issuing necessity certificates containing a percentage limitation on amortization: (1) When the *capacity* of a proposed facility was in excess of that necessary to national defense, a percentage limitation was placed in the certificate in order to deny the right of accelerated amortization to the excess capacity of the facility (WPB Circular No. 33, Criteria for Preparation of Recommendations for Necessity Certificates, reprinted in Record on Petition for Certiorari in *United States Graphite Co.* v. *Sawyer,* No. 532, Oct. Term 1949, p. 85). (2) When the proposed facility was found necessary in its entirety to the national defense but it was reasonable to assume it would be useful also after the war, a percentage limitation on amortizable cost was placed in the certificate pursuant to the

Board's illegal policy of limiting amortizable cost to the excess cost of war-time construction or acquisition as compared with normal or pre-war cost (WPB Circular No. 33, *supra*, included in part at R. 28-29).

Thus, two distinct types of percentage certificates were issued by the Board, although on their face they may be and often were identical in language. In the instant case, as well as in *Wickes Co.* v. *United States*, 108 F. Supp. 616 (Ct. Cls., 1952), the taxpayers obtained written statements from the certifying agent that the 35 percent of cost limitation contained in their certificates was imposed solely pursuant to the Board's policy of limiting amortization to excess cost of war-time construction where the entire facilities were necessary to the war effort but were presumed to have post-war utility (R. 5-7, 27-29).

In the *National Lead* case, several certificates were involved, containing percentages varying from 35 to 50 percent (23 T.C. 988, at 1003). The record in *National Lead* fails to show what the percentages in those certificates represented. Without a statement from the certifying agent or other evidence as to the meaning of the percentages there is no proof that the Board ever determined that the entire capacity of the facilities was needed in national defense. Therefore, the Second Circuit properly predicated its decision on the fact that "the Board never determined that the facilities in question were necessary to the national defense in their entirety" (230 F. 2d, at p. 165).

In the instant case the fact was established that the Board had "duly certified that all of the items included in the application for a Necessity Certificate with respect to the Tidd project were necessary in the interest of national defense".

To this the Government replied (p. 3):

> The [Ohio Power Co.] asserts (pp. 15-22) that there is no conflict to be resolved by this Court, it being contended that the decision of the Second Circuit in *Commissioner v. National Lead Co.*, 230 F. 2d 161, is distinguishable since the necessity certificates for less than 100 percent which were issued in that case might have reflected an administrative determination that the entire facilities were not necessary to the national defense, while here the certificates were issued for less than 100 percent because the facilities possessed a post-war utility.
>
> *Actually, the certificates which were issued in both cases appear to be identical. And, in National Lead, both the Government and the taxpayer presented the case to the Court of Appeals as one where the certificates were issued for less than 100 percent of cost only because of the policy of the administrative agency to reflect post-war use.* (Govt. Br. 5-6; Pet. Br. 2.) *Neither side even suggested that there was any difference between that case and this one.* (Emphasis supplied.)

Again, in the petition for a writ of certiorari in this case, No. 988, last Term, the taxpayer urged that the petition be granted because the decision below and the decision of the Court of Claims in the *Ohio Power* and *Allen-Bradley* cases were in conflict. After indicating that "it might be suggested that a distinction is to be found" (p. 7) we urged (p. 8):

> But whatever the niceties, if there be any, it is not meet that the result under a statute of the United States should differ *in identical circumstances* and should depend, yea or nay, upon the court before which the question happens to arise. (Emphasis supplied.)

We also said in our petition (pp. 5, 6):

> The Court [below] expressed disagreement with the reasoning in *Wickes* and interpreted the certificates as certifying the facilities as being only partially necessary to the national defense—i.e., only to the extent of the specified percentages of their costs—thus completely ignoring the finding of the Tax Court, adopting the stipulation of fact between the parties which the Commissioner summarized in his main brief below, p. 4, as follows:
>
> > All these partial certificates were issued pursuant to the then policy of the War Production Board of * * * certifying only that portion of the cost representing excess war costs where the facility had clear post-war use.[1]

[1] In its main brief below (p. 1) the taxpayer stated that it took "no issue" with the Commissioner's statement of the case. It is thus without warrant that it was asserted in the brief of The Ohio Power Company submitted in opposition to the Government's motion in *United States* v. *The Ohio Power Company*, No. 312, p. 17, that "[t]he record in *National Lead* fails to show what the percentages in those certificates represented"; i.e., excess capacity over that necessary to national defense or notwithstanding that the whole of the facility was found necessary to national defense, excess of wartime cost over peace-time cost where post-war use was reasonably anticipated. *Id.* pp. 15, 16. See Gov't Rep. Br. in No. 312, p. 3.

The Commissioner replied (p. 1):

> For the reasons stated in the petition for a writ of certiorari * * * we agree with the taxpayer that the ruling of the court below presents a clear and direct conflict in decisions * * *. See also the Government's petition for a writ of certiorari, petition for rehearing and motion for leave to file a second petition for rehearing in * * * *Ohio Power Company*, No. 312, this Term * * *.

In opposing the Government's petition for a writ of certiorari in *Allen-Bradley,* No. 923, last Term, the respondent in that case attempted to distinguish it from this case in the same way as had been tried in *Ohio Power,* but the Government replied (pp. 1-2):

> The brief in opposition filed by the taxpayer erroneously asserts (pp. 9-10) that the decision of the Court of Claims in this case is not in conflict with that of the Court of Appeals for the Second Circuit in *Commissioner* v. *National Lead Co.,* 230 F. 2d 161, in which a petition for certiorari (No. 988) has been filed and the Government does not oppose review.
>
> The ground on which the taxpayer attempts to distinguish *National Lead* is that in that case (p. 9) "the facilities in question were never certified as being necessary in the interest of national defense in their entirety", while here, it is asserted (pp. 2-4, 5-7), the facilities were certified as being necessary in their entirety, although the certificates embraced only a percentage of the cost of the facilities. * * *
>
> Any claim that the certificates involved in *National Lead* were different from those involved here is plainly without basis in fact.

In its current brief in *Allen-Bradley,* No. 78, this Term (which the Commissioner embraces as his own, Resp. B. 12), the Government says (Govt. B. 22, 23, n. 11):

> It was alleged and admitted that the language contained in the * * * necessity certificates involved in this case was almost identical to the language contained in the certificates * * * issued to the taxpayer in * * * *Wickes Corp.* v. *United States,* 108 F. Supp. 616 * * * upon which case the court below relied * * *. Accordingly we have in-

cluded in Appendix B to this brief an excerpt from the record in the *Wickes* case, consisting of an affidavit of Sidney T. Thomas * * * explaining the policy of the certifying agency * * *.

> This affidavit is part of the record in the case of *National Lead Co.* v. *Commissioner*, No. 124, present term, * * * *in which the identical issue is involved.* (Emphasis supplied.)

and, further, that (Govt. B. 3, 4):

> In each instance the duly designated certifying authority determined that facilities described in taxpayer's application were necessary in the interest of national defense; however, in three instances the certifying authority certified that only part of the cost of such facilities was necessary for the national defense. The issuance of these certificates for less than 100% of cost was in accordance with an established policy not to permit deductions for accelerated amortization of the entire cost of facilities which were determined to possess post-war utility.

Yet, now, the Commissioner would pick up (Resp. B. 17-22) *Ohio Power's* old argument, which the Government so completely demolished, discredited, and disavowed, and would urge that it was *stipulated* that the Board did not determine that the facilities here involved were necessary in their entirety in the interest of national defense.[21] And this is in the face of

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[21] The Commissioner's argument at Resp. B. 20, n. 6, is somewhat obscure. But, if he means that there is a distinction between "necessary to the war effort" and "necessary in the national defense", and that the latter is a more stringent test, he is clearly wrong. Moreover, that the Board was "expressly concerned with the Government's monetary interest" cannot alter the fact that under its own procedures *no* certificate, partial or otherwise, would issue unless the facility were first found to be essential. See our main brief, pp. 25-28.

the Commissioner's assertions below (see our main brief, pp. 7, 25) that the partial certifications in this case were bottomed solely on the presumed post-war utility of the facilities. Like Alice, we can only cry, "Curiouser and curiouser".

The Commissioner's answer (Resp. B. 17-27 at 22) to our argument (see our main brief, pp. 52-56) that in finding that the Board did not certify the facilities involved to be necessary in their entirety, the Court below improperly substituted a finding of its own for a contrary finding of the Tax Court, would confuse that issue with whether by reason of the failure of the Commissioner to plead any affirmative defenses (see our main brief, pp. 22-24, 58-59) any question of waiver, estoppel, or collateral attack could be considered. In any event, the Commissioner maintains (Resp. B. 22, 23) that the "precise issue" was before the Tax Court on the pleadings and was (Resp. B. 22)

> Whether the taxpayer was entitled to amortize its full cost or only the percentage of cost certified by the Board * * *.

With this statement of the issue before the Tax Court, the taxpayer wholly agrees. But this is not to say that the premise on which that issue was presented to the Tax Court was *not* that (Govt. B. 3, 4) the Board had "determined that [the] facilities * * * were necessary" but had issued its certificates in a form calculated "not to permit deductions * * * of the entire cost of facilities which were determined to possess post-war utility". In other words, the narrow issue before the Tax Court was whether under section 124 of the Internal Revenue Code of 1939, the Board

had authority to limit to less than full cost, the amount amortizable with respect to a facility concededly determined to be necessary in the interest of national defense, but having post-war usefulness.

Nor is the Commissioner aided by his argument in the Tax Court, in which he said (Resp. B. 23) that the Tax Court:

> could not grant amortization in excess of the percentage of costs certified by the Board for, otherwise, it would improperly be exercising the discretion entrusted to the Board.[22]

The taxpayer does not dispute the proposition that the Tax Court could not exercise the discretion entrusted to the Board. Obviously, the Tax Court could not determine whether or not a facility was necessary. But this is not to say that the Tax Court could not find that the Board had or had not determined that a facility was necessary, in whole or in part; or that the Tax Court could not determine whether under the statute the Board had authority to limit amortization to the war-induced costs of a facility it had found to be necessary but to have post-war utility.

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[22] The Commissioner quotes (Resp. B. 23) the following passage from his brief in the Tax Court:

> The Board, in fact, determined that only certain percentages * * * of petitioner's total costs of new facilities represented the excess war costs, and there is no evidence before this Court upon which different percentages could possibly be computed, whether or not such computations were within the province of the Court.

Obviously, it was the Commissioner's theory, in the Tax Court, that his case rested on the effect to be given to the Board's determination as to excess war cost, and not upon either any deficiency in the determination of necessity, or any affirmative defense.

POINT IV

IN CONTENDING THAT THE ISSUE HERE CANNOT BE DECIDED BY THE TAX COURT OR THE COURT OF CLAIMS, THE COMMISSIONER REPUDIATES THE WELL-SETTLED RULE, UPON WHICH THE GOVERNMENT CHIEFLY RELIED IN THE *GRAPHITE* CASE, THAT EXECUTIVE DISCRETION CANNOT BE CONTROLLED BY MANDAMUS.

The Commissioner says that instead of accepting the certificates involved in this case "without challenge" (which has no foundation in the record), the taxpayer should have (Resp. B. 26)

> * * * questioned the authority of the Board to issue partial certificates, by instituting prompt and appropriate proceedings in a court of competent jurisdiction * * *.

The Commissioner also puts it this way (Govt. B. 49):

> * * * although the statute here involved did not explicitly provide for a method of reviewing the actions of the certifying agency, this would not have precluded the taxpayer from seeking judicial review of the allegedly unlawful denial to it of a 100% certificate. * * * Indeed, the Court of Appeals for the District of Columbia Circuit in the *Graphite* case, * * * although not agreeing with the contention that the certifying agency lacked statutory authority to issue less than 100% certificates, *did not deny its power to review,* in an appropriate proceeding, the actions of that agency. (Emphasis supplied.)

What did the Court of Appeals for the District of Columbia do in the *Graphite* case, 176 F. (2d) 868 (1949), aff'g 71 Fed. Supp. 944 (1947)? It merely affirmed, *per curiam,* "on the opinion of Judge Pine in the District Court", with Judge Wilbur K. Miller

dissenting,[23] the refusal of the District Court to issue a writ of mandamus. So it is what Judge Pine did, and said, that we must examine to determine whether the District of Columbia courts "did not deny" the power to review. Judge Pine said (71 F. Supp. at p. 946):

> * * * defendant's construction being reasonable, it cannot be set aside by the courts in this proceeding.

and

> Certification under this statute, as implemented by this regulation, clearly involved an exercise of discretion, which will not be set aside unless unreasonable, arbitrary or capricious.

For these propositions, Judge Pine cited a group of cases, headed by *Adams* v. *Nagle*, 303 U.S. 532 (1938), and *Wilbur* v. *U. S. ex rel. Kadrie*, 281 U.S. 206 (1930), which had been relied upon by the Government in support of its argument that mandamus or injunction will not lie to control executive discretion, and upon which we rely. See our main brief, pp. 15-21. The Government had argued, in the memorandum it

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[23] The Commissioner notes (Govt. B. 30, n. 13) that Judge Clark, of the Court of Appeals for the District of Columbia, who joined in this affirmance, had been a member of the Senate Finance Committee in 1940 when that Committee considered the legislation which was enacted as section 124 of the Internal Revenue Code of 1939. The Commissioner fails to note that the amortization proposal had no more vigorous and vocal opponent in Congress than Senator Clark. (See Joint Hearings before Committee on Ways and Means and Committee on Finance, 76th Cong., 3d Sess., Aug. 9-14, 1940, p. 92; *id.*, pp. 161-2; Hearings before the Committee on Finance, 76th Cong., 3d Sess., Sept. 3-5, 1940, pp. 146, 167-8. See also petition for writ of certiorari, and brief in support thereof, in *U. S. Graphite Co.* v. *Sawyer*, No. 532, October Term, 1949, pp. 40-46).

submitted to Judge Pine in support of its motion to dismiss the complaint (p. 21):

> It must be remembered that what is here involved is an action for mandatory injunction.[1] Accordingly, there is brought into play the firmly established rule that decisions of administrative officers, where they involve an exercise of discretion and insofar as they are not unreasonable or plainly wrong, will not be reversed or set aside by process in the nature of mandamus. This rule has been consistently applied for well over a century. There is no need to multiply authorities on this point.* * *
>
> [1] The mandatory injunction here sought is in substance and effect the precise equivalent of a writ of mandamus, and its issuance is governed by identical considerations. * * *

In resisting the *Graphite* appeal in the Court of Appeals for the District of Columbia, the Government's brief made precisely the same point, in precisely the same words, and relied upon precisely the same authorities (pp. 29, 30). Its brief went on (p. 31):

> Even assuming that the construction of the statute by the executive is erroneous, "Since the earliest cases, it has been held that where an officer's action involves the exercise of his discretion in the construction and interpretation of a statute, mandamus will not issue to compel him to act upon one construction rather than another." * * *
>
> * * *
>
> In upholding or refusing to interfere with the executive's construction of the law, the Court need not be absolutely satisfied that the construction is correct, but only that such an interpretation of the statute was a reasonable and possible one. * * *

The Graphite Co. sought review of the decision of the Court of Appeals for the District of Columbia by

a petition to this Court for a writ of certiorari, No. 532, October Term, 1949. In its brief in opposition to the petition, the Government said (pp. 15, 16):

> Even if his construction of the statute be erroneous, mandamus will not issue to compel the administrative official to act upon one construction rather than another. The interpretation need only be reasonable. "Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction."[24]

We believe that the foregoing passages from the Government's briefs in the *Graphite* cases properly state the law, and, indeed, we have so stated it.[25] Certainly, whatever else may depend on it, legal principle cannot depend on whose ox is being gored.

CONCLUSION

In our main brief we said (p. 47) that the Congressional purpose to predetermine by statute the amount amortizable with respect to a certified facility was so manifestly clear that the question arises as to how and why the contrary can be urged, and we suggested that the answer lay in an attempt to equate post-war hindsight with pre-war foresight.[26] We return to that for our closing theme.

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[24] Here the Government cited *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 324-325 (1903); *Work* v. *Rives*, 267 U.S. 175, 183 (1925); and *Adams* v. *Nagle*, 303 U.S. 532, 542 (1938), upon which we also rely. See our main brief, pp. 18-22.

[25] See our main brief, pp. 15-22.

[26] See our main brief, pp. 47-52.

It is to be remembered that when the Second Revenue Act of 1940 was enacted, economic conditions were not what they have since become. Thus, no less an authority on the subject than former President Hoover, pointing to American Federation of Labor figures of 10,656,000 unemployed in January 1940, as against 12,300,000 unemployed in July 1932, the low point of the depression, and to the Federal Security Agency's estimates of 16,908,000 persons on relief in 1940, as against 16,620,000 in 1932, has written[27] that

> The Great Depression extended from 1929 to 1941 * * *. After January, 1940, war production and large mobilization for the armed forces began to have some effect; but even at Pearl Harbor (December, 1941), more than 8,000,000 were still unemployed.

It is also to be remembered that many, including the late President Roosevelt, believed that the depression had been caused in large part by an overexpansion of American industry's productive capacity.[28] On July 2, 1932, he said:[29]

> In the years before 1929 * * * this country had completed a vast cycle of building and inflation; for ten years we expanded on the theory of repairing the wastes of the War, but actually expanding far beyond that, and also beyond our natural and normal growth. * * * there was little or no drop in * * * prices * * * although * * * the cost of production fell very greatly; corporate

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[27] 3 Herbert Hoover, *Memoirs—The Great Depression, 1929-1941* (1952), 471-473.

[28] Id., 243.

[29] 1 Rosenman, *The Public Papers and Addresses of Franklin D. Roosevelt* (1938), 650, 651.

> profit * * * was enormous * * *. Very little of it went into increased wages * * * and by no means an adequate proportion was even paid out in dividends * * *. * * * Enormous corporate surpluses piled up * * *. Where * * * did those surpluses go? * * * Why, they went chiefly in two directions: first, into new and unnecessary plants which now stand stark and idle * * *.

Again, on August 20, 1932, he said:[30]

> * * * the forced production of our industry was far too great for our domestic markets.

And again, on September 23, 1932, he said:[31]

> Our industrial plant is built; the problem just now is whether under existing conditions it is not overbuilt. * * * A mere builder of more industrial plants * * * is as likely to be a danger as a help. * * * Our task now is not * * * necessarily producing more goods. It is the soberer, less dramatic business of administering * * * plants already in hand, of seeking to reestablish foreign markets for our surplus production, of meeting the problem of underconsumption, of adjusting production to consumption * * *.

It is no wonder, then, that in 1940 American industry was unwilling to take the risk involved in further expanding its productive capacity, for once the emergency was behind us, was it not reasonable to assume that conditions would revert to the *status quo ante*?

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[30] Id., 672.

[31] Id., 750-752. See also id., 783, 785.

Indeed, as late as the Winter of 1944 and the Fall of 1945 responsible Congressional committees felt that there was serious danger of just that happening. See our main brief, pp. 51, 52.

The view, prevalent in 1940, that American industry's capacity to produce was already greater than the ability of the available markets normally to consume, had not only responsible opinion but also bitter experience to support it. And, this is the context in which the amortization provisions of the Second Revenue Act of 1940 and the illuminating statement of the Committee on Ways and Means in reporting them favorably must be read. The Committee said:[32]

> *To obtain the needed facilities will require the investment of hundreds of millions of dollars. Your committee has been informed by the Advisory Commission to the Council of National Defense that substantial amounts of private capital will not be invested in * * * such facilities unless corporations are assured, in view of the fact that such facilities will be of use chiefly only during the period of national emergency, that they will be permitted to amortize the cost thereof over a shorter period than would be permitted under the depreciation provisions * * *.* (Emphasis supplied.)

[32] H. Rept. No. 2894, 76th Cong., 3d Sess., p. 16, quoted at p. 50 of our main brief. For an almost identical statement, see Randolph E. Paul, *op. cit. supra*, n. 18, p. 25, at 262.

The decision of the Court below frustrates the clear Congressional purpose. It should be reversed.

Respectfully submitted,

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DECEMBER, 1956

In the Supreme Court of the United States

OCTOBER TERM, 1955

No: 988

NATIONAL LEAD COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

For the reasons stated in the petition for a writ of certiorari and the reply brief filed by the United States in *United States* v. *The Allen-Bradley Company,* No. 923, this Term, we agree with the taxpayer that the ruling of the court below presents a clear and direct conflict in decisions which should be resolved by this Court. See also the Government's petition for a writ of certiorari, petition for rehearing, and motion for leave to file a second petition for rehearing in *United States* v. *Ohio Power Company,* No. 312, this Term (certiorari denied, 350 U. S. 862; petition for rehearing denied, 350 U. S. 919; motion

287869—56

for leave to file second petition for rehearing denied, May 28, 1956). Accordingly, although we believe the decision below to be correct, the Government does not oppose the granting of certiorari in this case.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

JUNE, 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

INDEX

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and other authorities involved	2
Statement	3
Summary of Argument	7
Argument:	
Since only part of the cost of certain facilities had been certified as necessary in the interest of national defense, the taxpayer was not entitled to amortization deductions with respect to the entire cost of such facilities	11
A. Preliminary	11
B. Section 124 of the Internal Revenue Code authorized the issuance of partial certificates of necessity	12
C. In any event, since the Board never determined that the entire cost of the facilities was necessary in the interest of the national defense, the Tax Court erred in allowing a tax deduction just as though the taxpayer had received certificates for 100% of their cost	17
Conclusion	27

CITATIONS

Cases:	
Addison v. *Holly Hill Co.*, 322 U. S. 607	19
American Twist Drill Co. v. *Commissioner*, 11 T. C. 200	21
Arkansas-Oklahoma Gas Co. v. *Commissioner*, 17 T. C. 1208, reversed, 201 F. 2d 98	21
Ohio Power Co. v. *United States*, 129 F. Supp. 215, certiorari denied, 350 U. S. 862, rehearing denied, 350 U. S. 919, motion for leave to file second petition for rehearing denied, 351 U. S. 958, order denying petition for rehearing vacated and petition for rehearing continued, 351 U. S. 980	11, 25

406756—56——1

tion to the Board and was designed only to limit the certification to post-December 31, 1939 costs.[4]

2. Although, as it relates to the statutory authority of the Board, it is quite immaterial whether there are any real differences between partial certificates where the proposed facilities would have a greater capacity than was needed or would be used only partially for defense production, and partial certificates where the proposed facilities would have a clear post-war use (for the statute no more prohibits the latter than it does the former), we believe that the taxpayer is mistaken in contending that there is any real distinction between the two situations.

The Board, it will be noted, treated all the situations in which partial certificates would be issued as

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[4] The issuance of a partial certificate for an indivisible emergency facility, which as we contend was authorized under Section 124 (f), may be contrasted with the situation where only a part of divisible property has been certified as being necessary in the interest of the national defense. In the latter situation, the "emergency facility", as defined in Section 124 (e) (1), is the part of the divisible property which has been certified, and the remainder is not an "emergency facility"; in such a situation the amortization deduction under Section 124 (a) is limited to the part which is an "emergency facility"—the remainder of the property being subject to depreciation deductions under Section 23 (l). However, if the entire property has been certified, with the certificate being limited to an indivisible portion of the property or its cost, the entire property is an "emergency facility" under Section 124 (a), but Section 124 (g) specifies how the amortization and depreciation deduction shall be calculated. See also Sec. 29.124-6, Treasury Regulations 111, as amended.

While Section 124 (e) contemplates the certification of a divisible part of property, it is Section 124 (f) which authorizes the issuance of a partial certificate with respect to indivisible property.

Cases—Continued Page

United States v. *Allen-Bradley Co.*, No. 78, October Term, 1956 ..... 2, 7, 11, 12, 16, 17, 19, 20, 24, 25, 26

United States Graphite Co. v. *Harriman*, 71 F. Supp. 944, affirmed *per curiam*, *sub nom. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868, certiorari denied, 339 U. S. 904 ..... 5, 25

Wickes Corp. v. *United States*, 108 F. Supp. 616 ..... 24, 25

Statutes:

Internal Revenue Code of 1939:

Sec. 23 (l) (26 U. S. C. 1952 ed., Sec. 23 (l)) 14, 15

Sec. 23 (t) (26 U. S. C. 1952 ed., Sec. 23 (t)) 2

Sec. 124 (26 U. S. C. 1952 ed., Sec. 124) 8, 12

Sec. 124 (a) (26 U. S. C. 1952 ed., Sec. 124 (a)) 2, 14

Sec. 124 (d) 26 U. S. C. 1952 ed., Sec. 124 (d)) 2, 17

Sec. 124 (e) (26 U. S. C. 1952 ed., Sec. 124 (e)) 2, 14

Sec. 124 (f) (26 U. S. C. 1952 ed., Sec. 124 (f)) 2, 8, 14, 15

Sec. 124 (g) (26 U. S. C. 1952 ed., Sec. 124 (g)) 2, 14

Sec. 124A (26 U. S. C. 1952 ed., Sec. 124A) 2

Miscellaneous:

Executive Order 9406, 8 Fed. Register 16955 2

Executive Order 9429, 9 Fed. Register 2487 2

Treasury Regulations 111, Sec. 29.124–6 ..... 2, 14

War Department Regulations, Issuance of Necessity Certificates, 7 Fed. Register 4233 2

War Production Board Regulations, Issuance of Necessity Certificates, 8 Fed. Register 16965 ..... 2, 26

being essentially the same. (R. 50–51.) In this it was entirely correct. If the proposed facility had a capacity in excess of that needed for the national defense, or, for any reason, was to be used only partially for defense production, it would be clear that only part of the taxpayer's cost of acquiring the facility would be devoted to the national defense and, in harmony with the purpose of the statute, it would be proper that only such portion of the cost qualify for the extraordinary deduction afforded by rapid amortization; the rest of the taxpayer's cost, not being necessary to the national defense, would properly be depreciated under Section 23 (l), the same as the cost of any other property. Where, as here, the proposed facility would have a clear post-war use, it is equally plain that only part of the taxpayer's cost would be devoted to the national defense and part would ultimately be devoted to non-defense purposes; and it is equally appropriate in this situation, too, that only part of the cost should qualify for the extraordinary deduction afforded by rapid amortization, with the remainder of the cost being recouped by ordinary depreciation deductions. In short, the statutory grant of authority under Section 124 (f) reposed sufficient discretion in the Board to determine that only part of the cost basis of a particular facility would be necessary in the interest of the national defense and authorized it to issue a certificate under which only that part would qualify for the amortization deduction.

3. The taxpayer (Br. 47–52) seems to argue that the statute must be interpreted in the light of the con-

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 124

NATIONAL LEAD COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Tax Court (R. 52–55) is reported at 23 T. C. 988. The opinion of the Court of Appeals (R. 57–62) is reported at 230 F. 2d 161.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1956. Taxpayer's petition for rehearing, filed on February 29, 1956, was denied on March 12, 1956. (R. 63–64.) The petition for a writ of certiorari, filed on May 29, 1956, was granted on June 11, 1956. (R. 64.) The jurisdiction of this Court rests upon 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the War Production Board, in issuing necessity certificates for accelerated amortization, had authority to certify only part of the cost of a new facility.

2. Whether the legality of the Board's action in issuing such certificates can be tested many years later by a collateral attack in a Tax Court proceeding, rather than through direct review. Stated otherwise, the question is, assuming the Board had no authority to issue "partial cost" certificates, whether the Tax Court could properly enter a decision as though the taxpayer had received certificates for 100% of the cost of facilities when, in fact, the certificates issued by the Board were for only part of the costs.[1]

STATUTES AND OTHER AUTHORITIES INVOLVED

Pertinent provisions of Sections 23 (t) and 124 (a), (d), (e), (f) and (g) and 124A (e) of the Internal Revenue Code of 1939, of Executive Orders 9406 and 9429, of Sections 1, 2, 3, 5 and 9 of the Regulations and Amended Regulations Governing the Issuance of Necessity Certificates Under Section 124 (f) of the Internal Revenue Code of 1939, and of Section 29.124–6 of Treasury Regulations 111, are set forth in Appendix A to the Brief for the United States in the companion case, No. 78, *United States* v. *Allen-Bradley Co.*

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[1] This question embraces several subsidiary questions which taxpayer states separately as questions 1, 2, 5, 6 and 7 (Br. 2–4) and which are discussed *infra*, pp. 20–26.

STATEMENT

The facts relevant on this review, as stipulated (R. 3–52) and found by the Tax Court (R. 53–54), may be summarized as follows:

The taxpayer, a New Jersey corporation, is one of the principal producers in the United States of alloys and mixed metal products suitable for use in the manufacture of industrial bearings. Since 1935 the taxpayer has had a controlling stock interest in the American Bearing Corporation, a company engaged in the manufacture and sale of industrial bearings. On or about February 8, 1944, the taxpayer purchased the remaining outstanding stock of American Bearing, and on June 30, 1944, caused it to be liquidated. Since that date, the business previously conducted by American Bearing has been carried on by the taxpayer. (R. 4–5.)

Pursuant to Section 124 of the Internal Revenue Code of 1939, permitting accelerated amortization deductions with respect to "emergency facilities", the American Bearing Corporation on February 1, 1944, applied to the War Production Board, the certifying agency at that time, for a certificate of necessity to cover the cost of certain facilities for the production of bronze back, heavy ball bearings for heavy duty diesel and steam engines. (R. 5.) On February 5, 1944, the War Production Board issued the following certificate (R. 5, 8A):

Date _____

NC-1893

UNITED STATES OF AMERICA

WAR PRODUCTION BOARD

NECESSITY CERTIFICATE

To the COMMISSIONER OF INTERNAL REVENUE:

Pursuant to Section 124 of the Internal Revenue Code, particularly subsection (f) thereof, and in response to the application filed by

American Bearing Corporation
429 S. Harding Avenue
Indianapolis, Indiana

It is hereby certified that the facilities described in the attached Appendix A (Consisting of three pages _____) are necessary in the interest of national defense during the emergency period, up to 50% of the cost attributable to the construction, reconstruction, erection, installation or acquisition thereof, and that the application for this Certificate was filed on February 1, 1944.

WAR PRODUCTION BOARD,
By J. JOSEPH WHELAN,
Recording Secretary.

Feb. 5, 1944.

Subsequently, American Bearing filed another application for a necessity certificate relating to other facilities to be constructed and the taxpayer itself filed two additional applications. In response to these three applications, the War Production Board

issued three more necessity certificates, worded like the first except that the percentage certified in these certificates was 35%. (R. 5–6, 8A–8B.)

All four percentage certificates were issued pursuant to the policy then adopted by the War Production Board to curb further plant expansion by granting necessity certificates only when it would clearly be in the Government's interest that the particular facility be privately financed, and where the facility had clear post-war use, by certifying only that portion of its cost which represented excess war costs. In the ordinary case this cost was considered to be 35%. (R. 9–52.[2])

Having received the necessity certificates in question, taxpayer proceeded to construct and acquire the facilities to which they related. (R. 6–7). In its tax returns taxpayer computed its amortization deductions in accordance with the percentages of cost set forth in these certificates, the remaining cost being treated as subject to ordinary depreciation deductions. When the Commissioner subsequently asserted deficiencies against the taxpayer based on other

[2] The affidavit of Sidney T. Thomas, Chief of the Tax Amortization Branch, Civilian Production Administration, explaining the policy of the War Production Board in these percentage certification cases, was prepared in connection with, and is part of the record in, *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944 (D. D. C.) affirmed *per curiam*, *sub nom. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C. A. D. C.), certiorari denied, 339 U. S. 904. This affidavit was made a part of the record in the instant case (R. 9–52) and it was stipulated that the affidavit, with its accompanying exhibits, sets forth the reasons for the percentage limitations appearing on the necessity certificates here involved (R. 7).

grounds, taxpayer on November 21, 1951, filed a petition for redetermination by the Tax Court. On April 9, 1954, taxpayer filed an amendment to its petition, contending for the first time that the War Production Board had no authority to certify less than 100% of the cost of the facilities, and that taxpayer was entitled to accelerated amortization deductions with respect to the entire cost of such facilities.[3] (R. 1–2.)

The Tax Court, with Judge Opper dissenting, sustained the taxpayer's contentions. (R. 52–55.) On appeal, the Second Circuit reversed the Tax Court's decision. Pointing out that it was unnecessary to decide whether the statute authorized issuance of certificates for less than 100% of cost (R. 59), the Court of Appeals held that the taxpayer could not, in any event, be allowed the deductions claimed because the War Production Board had discretionary authority to determine what facilities were necessary in the interest of the national defense, that it had not certified 100% of the cost of the facilities as necessary in the interest of national defense, and the Tax Court, having no authority to exercise the discretion entrusted to the War Production Board, could not allow a tax deduction just as though the taxpayer had received certificates for 100% of the cost of the facilities. The court observed that the taxpayer, having accepted the benefits of the percentage certificates and having failed to challenge their validity prior to the Tax

[3] It was stipulated (R. 7) that if a greater amortization deduction were allowed, it should be reduced by the amount of the depreciation deductions which had been taken.

Court proceeding, was bound by the limitations of the certificates which were issued to it. (R. 60–62.)

SUMMARY OF ARGUMENT

I

There are in this case, as in *United States* v. *Allen-Bradley,* No. 78, now pending before this Court, two ultimate questions—(1) whether the War Production Board had statutory authority to issue necessity certificates which did not cover the entire cost of particular facilities, and (2) assuming that the Board lacked such authority, whether the Tax Court could properly allow amortization deductions with respect to the entire cost of the facilities notwithstanding the fact that the Board had determined that only part of such cost was to be covered by necessity certificates. The Tax Court decided both of these questions in favor of the taxpayer. The Court of Appeals decided the second question in favor of the Commissioner, finding it unnecessary, under the circumstances, to reach the first question. Since, for the most part, the Government's position on both of these questions is fully set forth in its brief in *Allen-Bradley,* our discussion here will be limited to answering specific points raised in taxpayer's opening brief.

II

Contending that the War Production Board lacked statutory authority to issue necessity certificates covering only part of the cost of particular facilities, taxpayer argues that the "only so much of" phrase in

Section 124 (f) of the Internal Revenue Code of 1939 was designed merely to limit certification to post-1939 construction costs. At the same time taxpayer apparently assumes that the Regulations validly provided for partial certificates in cases where the size or capacity of the facilities was greater than necessary in the interest of national defense, even though the entire facilities were constructed after December 31, 1939. A conclusion that the Board had discretion to issue a partial certificate in such a situation, however, stands in flat contradiction to the contention that the statute does not permit a partial certificate unless part of the facility was constructed or acquired prior to 1940.

Moreover, not only is there no statutory basis for the distinction which taxpayer would draw, but factually the two situations are also essentially the same. Thus, to the extent that a facility's costs are allocable to post-war, non-defense use, those costs are no more necessary in the interest of national defense than costs allocable to excess capacity attributable to non-defense use during the emergency period.

Taxpayer also seems to argue that, since the statutory amortization provisions were enacted at a time when it was not known whether particular facilities would have post-war utility, Congress could not have intended the Board to take post-war utility into account when issuing necessity certificates. It would, however, be absurd to assume that Congress in enacting the statutory amortization provisions thought that shortages and the emergency would last forever

and that the time would never come when there would be a diminishing need for plant facilities and when the fact of post-war utility could be definitely ascertained.

III

As previously indicated, the Court of Appeals in the instant case held that, even assuming that the War Production Board lacked statutory authority to issue partial certificates, (1) the necessity certificates here involved did not represent an administrative determination that the facilities in question were fully necessary in the interest of national defense, and (2) since the Tax Court had no authority to make that determination, it could not properly allow amortization deductions as though such a determination had been made. In challenging this holding, taxpayer erroneously assumes that the percentage limitations of the necessity certificates involved are entirely separate and distinct from the Board's determination and certification as to the necessity of the facilities in question. But, the announced policy of the executive, the regulations approved by the President, the standards followed by the Board, the instructions issued for the guidance of its personnel and the very terms of the certificates themselves, all conclusively establish that the Board did not make a determination of necessity without regard to the percentage limitations set forth in the certificates. Rather, the uncontradicted facts clearly demonstrate that the Board, taking into consideration the cost of the certification program in lost revenue to the Government, deter-

mined that it would not be in the national interest to issue 100% certificates in the case of facilities having post-war utility, and that it would be in the interest of national defense to have such facilities privately rather than publicly financed only where a partial certificate was issued "based, for example, on excess cost attributable to the war".

Taxpayer's argument that the Tax Court had jurisdiction to review all issues relating to its tax liability is based on a mistaken premise. It assumes that, if the Board did not have statutory authority to issue partial certificates, the taxpayer would automatically be entitled to 100% certificates. But, on the contrary, it would still be up to the Board to determine whether to issue 100% certificates or to issue none, a determination which the Board did not make and which the Tax Court could not make for the Board.

In so holding, the Court of Appeals did not decide this case on the basis of a new issue on appeal. Nor is there any merit to taxpayer's argument that the Court of Appeals disregarded the stipulated facts. Finally, since the stipulated facts fully and clearly disclose the basis upon which the necessity certificates were issued, and since the Tax Court has no authority to amend those certificates or to require them to be amended by the certifying agency, no useful purpose would be served by having the case remanded, as taxpayer suggests.

ARGUMENT

SINCE ONLY PART OF THE COST OF CERTAIN FACILITIES HAD BEEN CERTIFIED AS NECESSARY IN THE INTEREST OF NATIONAL DEFENSE, THE TAXPAYER WAS NOT ENTITLED TO AMORTIZATION DEDUCTIONS WITH RESPECT TO THE ENTIRE COST OF SUCH FACILITIES

A. PRELIMINARY

As taxpayer indicates (Br. 6–7), there are in this case two ultimate questions, both of which are also common to *United States* v. *Allen-Bradley Co.*, No. 78, now pending before this Court, and *Ohio Power Co.* v. *United States*, 129 F. Supp. 215 (C. Cls.), certiorari denied, 350 U. S. 862, rehearing denied, 350 U. S. 919, motion for leave to file second petition for rehearing denied, 351 U. S. 958, order denying petition for rehearing vacated and petition for rehearing continued, 351 U. S. 980. These questions are (1) whether the War Production Board had statutory authority to issue necessity certificates which did not cover the entire cost of particular facilities, and (2) assuming that the Board lacked such authority, whether the Tax Court could properly allow amortization deductions with respect to the entire cost of the facilities notwithstanding the fact that the Board had determined that only part of such cost was to be covered by the necessity certificates. In allowing the amortization deductions claimed, the Tax Court decided both of these questions in favor of the taxpayer. In reversing the decision of the Tax Court, the Court of Appeals decided the second question in favor of the Commissioner, finding it unnecessary, under the circum-

stances, to reach the first question. Since, for the most part, the Government's position on both questions is fully covered in the brief for the United States filed in the *Allen-Bradley* case, *supra*, we will limit our discussion here to answering specific matters raised by the taxpayer which warrant comment.

B. SECTION 124 OF THE INTERNAL REVENUE CODE AUTHORIZED THE ISSUANCE OF PARTIAL CERTIFICATES OF NECESSITY

1. The taxpayer contends that the plain language of Section 124 of the 1939 Code requires the conclusion that the Board had no authority to issue the partial certificates of necessity involved in these cases; it argues that the "only so much of" phrase of Section 124 (f) was designed only to permit certification of the basis of property attributable to construction or acquisition after December 31, 1939, and precluded the Board from issuing the limited certificates which it granted to this and other taxpayers. (Br. 25–52.) We shall not repeat the arguments made in our brief in *Allen-Bradley* (pp. 26–47) which show that not only is there no basis for imputing to Congress an intent to impose such a restriction upon the Board, but that the statutory amortization provisions themselves, the basic underlying congressional purpose, the contemporaneous administrative construction, and all other relevant aids to interpretation support the conclusion that Congress did not prohibit the Board, where it found the facts so required, from certifying part rather than all of the cost of a particular facility.

We do note, however, that the taxpayer tacitly assumes, at least it does not deny, that the Board had authority to issue partial certificates in some circumstances, even though the entire facility was constructed or acquired after December 31, 1939. Where there were "facilities of a size or capacity greater than was necessary in the interest of national defense, or where the facilities certified were to be used only partially for defense production", the taxpayer recognizes that partial certificates were issued, and were contemplated by the applicable, contemporaneous Treasury Regulations. (Br. 46.) But, the taxpayer argues, partial certificates in these situations were different from partial certificates which were designed to preclude amortization of a portion of the costs of facilities which would have a post-war use. (Br. 46–47.)

But, once it is admitted that Section 124 is broad enough to empower the Board to issue some kind of partial certificates, it follows that it had authority to issue partial certificates in any situation, for there is nothing in the statute which draws the distinctions being made by the taxpayer or which authorizes the issuance of partial certificates in some situations and denies it in others. Indeed, the Board's authority to issue a partial certificate in any situation would have to come from the "only so much of" phrase of Section 124 (f). A conclusion that the Board had discretionary authority to issue partial certificates in any situation stands in flat contradiction to the taxpayer's argument that Section 124 (f) granted no discre-

ditions which prevailed in 1940, when the amortization provisions were enacted, and that, since no one then knew (Br. 48) "what the future held", Congress could not have predicted that facilities would have any post-war utility and could not have granted any discretion to the Board ever to take post-war utility into account.

This assumption—that Congress' outlook was so narrow and short-sighted—cannot be accepted. To be sure, during the defense era and the early stages of the war, the emphasis of the legislature and the executive was on the immediate, critical need for a rapid expansion of production facilities. And, as we observed in the *Allen-Bradley* brief (pp. 42–43), at this stage of the development of the nation's war economy, possible post-war utility was remote and contingent, and was undoubtedly a relatively small factor in the over-all problem. But one can scarcely assume that Congress legislated on the premise that there would never be any improvement in plant facility capacity, that there would never come a time when the end of the emergency would be in sight, and that possibilities of post-war use would always be unclear, even with respect to construction taking place in later years when the war drew to its inevitable close. It is more realistic to assume that Congress did not legislate with a static condition in mind, and did anticipate that there would be a diminishing need for new plant facilities in the future and that there would come a time when the possibility of post-war utility would be clear enough to be taken into account in determining whether, and how much,

rapid amortization should be allowed.[5] We should not attribute to Congress, in the absence of evidence, an intent to impose unrealistic and self-defeating restrictions on the Board which would have precluded it, for all time, from doing anything except either to certify the full costs of any facility constructed and acquired after December 31, 1939, or else to deny a certificate altogether. As we have pointed out in the *Allen-Bradley* brief (pp. 26–47) not only is there nothing in the statute or its legislative history to justify the conclusion that such rigidity of administration was intended, but everything points the other way.

C. IN ANY EVENT, SINCE THE BOARD NEVER DETERMINED THAT THE ENTIRE COST OF THE FACILITIES WAS NECESSARY IN THE INTEREST OF THE NATIONAL DEFENSE, THE TAX COURT ERRED IN ALLOWING A TAX DEDUCTION JUST AS THOUGH THE TAXPAYER HAD RECEIVED CERTIFICATES FOR 100% OF THEIR COST

As we have already observed, the Court of Appeals did not find it necessary to decide whether the statute empowered the Board to issue partial certificates of necessity. Instead, its decision rests on the undeniable fact that there never has been a certification that 100% of the cost of the taxpayer's facilities was necessary in the interest of the national defense. Since the Tax Court had no power to make any determination of what was necessary in the interest of the national defense, the Court of Appeals held, correctly we believe, that the Tax Court could not decide the case by granting amortization deductions

[5] Section 124 (d) (1) illustrates that Congress contemplated the possibility that the emergency might be terminated prior to the 5-year amortization period for any particular facility.

on the full amount of the cost of the facilities, just as though the War Production Board had certified 100% of the costs as being necessary in the interest of the national defense, when the Board had never made such a determination.

At the outset, before examining the taxpayer's arguments on this aspect of the case in greater detail, we believe it pertinent to observe that the various contentions being made rest, almost entirely, on a single assumption—an assumption which is demonstrably wrong. The taxpayer's constant assumption (sometimes stated, but for the most part implicit) is that the War Production Board, in issuing the certificates, had made an absolute determination that the facilities, in their entirety, were necessary in the interest of the national defense and that the Board, as a wholly separate and independent matter, having no relation to or bearing on this determination of necessity, had attempted to limit the amount of the amortization deduction because the facilities would have a post-war utility—a limitation which the taxpayer contends was illegal and could be disregarded by the Tax Court as an unauthorized, meaningless, and separable appendage. (See, for example, Pet. Br. 27–30, 52–54.)

But this assumption is completely unwarranted for the stipulated facts make it perfectly plain that the Board did not determine and did not intend to determine that the facilities, as an abstract matter, were necessary in the interest of the national defense; instead, the determination that only a stated percentage of cost was necessary in the interest of the national defense represented an ultimate, indivisible

judgment on the part of those who were empowered to make these decisions. The two elements of the administrators' judgment, far from being separate and distinct, were in fact inseparable and integrally related to each other. Cf. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 618–19.

As we have shown in the *Allen-Bradley* brief (pp. 20–25, 52–56), and as is demonstrated by the record in this case (R. 7–52), the announced policy of the executive, the Regulations approved by the President, the standards followed by the Board, the instructions issued for the guidance of its personnel, and the very terms of the certificates, leave no grounds for contending that the War Production Board made a determination of necessity without any regard to the percentage limitations contained in the certificates. The uncontradicted facts, as stipulated by the parties, demonstrate that the Board had made an advance, general determination that, taking into account the cost to the Government, it would not be in the interest of the national defense to issue 100% certificates unless it was reasonable to assume that the facilities would not be useful after the war (R. 50), and had similarly determined that, where possible, it would be in the interest of the national defense that facilities having a post-war use (R. 52) "be publicly rather than privately financed with a 100 percent certificate" and that it would be in the interest of the national defense that such facilities be privately financed only were a partial certificate was issued (R. 52) "based, for example, on excess cost attributable to the war." (See also R. 13–17.)

These and other stipulated, uncontroverted facts make it plain that the taxpayer is in error in assuming that (Br. 29) the "facts found by the administrative agency" represent a finding sufficient to enable the Tax Court to disregard the percentage limitations in the certificates as irrelevant surplusage, and to consider that the Board had determined that it was necessary in the interest of the national defense that the property be acquired by this taxpayer, even if 100% of the cost was required to be recouped by rapid amortization.*

1. The taxpayer's extended argument (Br. 12–22) concerning the jurisdiction of the Tax Court to review all issues relating to its tax liability is without merit. It assumes, erroneously, that if the Board had no statutory authority to issue a partial certificate, the taxpayer would automatically be entitled to a certificate for 100% of its costs. But, as we have shown in *Allen-Bradley* (Br. 50–56), had the Board been properly apprised that it lacked authority to issue partial certificates, it still would have had to exercise discretion in deciding whether to issue certi-

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*The taxpayer (Br. 27–28) points to the fact that the Board had made an advance, general determination that (R. 45–46, 51) "no facility will be certified unless the war effort would actually be weakened by the lack thereof" and seems to contend that the issuance of any kind of certificate necessarily meant that the facilities were necessary in the interest of the national defense. But this overlooks the fact that the Board was expressly concerned with the Government's monetary interest and the alternative possibility of direct government financing of facilities necessary to the war effort. (R. 45, 51.) In other words, a facility could be necessary to the war effort and still not be necessary to the national defense if it had to be privately financed under a 100% certificate.

ficates or to deny them. As the court below observed (R. 61) "If the percentage of cost subject to amortization was varied, the cost to the government would vary, and the determination as to necessity might not be the same."

The Tax Court, even if it was right in concluding that the Board lacked statutory authority to issue partial certificates, had no authority to issue a 100% certificate; it could not make the administrative judgment of necessity; that function was solely entrusted to the Board. Yet, the Tax Court did precisely that when it decided that the taxpayer was entitled to amortization deductions just as though it had received certificates for 100% of the cost of the properties.[7]

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[7] The foregoing, together with the fact that the Tax Court could not even require the Board or its successor in interest to exercise administrative discretion, also demonstrates the fallacy of the taxpayer's contentions (Br. 18–22) that review in the Tax Court represented an adequate remedy which would have precluded it from seeking a direct judicial review by mandamus, injunction, or otherwise (e. g., declaratory judgment) of the validity of the Board's action in issuing partial certificates.

It is also plain that *American Twist Drill Co.* v. *Commissioner*, 11 T. C. 200, and *Arkansas-Oklahoma Gas Co.* v. *Commissioner*, 17 T. C. 1208, reversed, 201 F. 2d 98 (C. A. 8th) (Pet. Br. 13–14), do not lend any strength to the taxpayer's contentions for those cases did not involve any question of the exercise of further discretion by the Board. Indeed, in the *Arkansas-Oklahoma* case, the Court of Appeals, in reversing the Tax Court, expressly recognized (p. 103):

"This determination is not reviewable by the courts. A Necessity Certificate made by the Advisory Counsel and the Secretary of War conclusively determines not only the necessity for the described facility and for the material to be produced by it for the national defense, but also the percentage of cost of acquisition includible in the adjusted basis of the facility for the purpose of amortization."

The court below was altogether correct, therefore, in concluding that (R. 61):

> Since the Board never determined that the facilities in question were necessary to the national defense in their entirety, it was error for the Tax Court to permit accelerated amortization of their entire cost. Neither that court nor any other court could make the determination of necessity entrusted to the Board. Cf. *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20–21 (1952).

2. The taxpayer contends, however, that the Court of Appeals, in so holding, erroneously undertook to decide an issue which was not raised in the Tax Court (Br. 22–24), and that it did so by disregarding the facts stipulated by the parties and found by the Tax Court (Br. 52–55, 58–60). Further, the taxpayer contends that, at the very least, the Court of Appeals should have remanded the case to the Tax Court (Br. 55) "to afford the taxpayer an opportunity to improve the record, if it could."

(*a*) In holding that the taxpayer was not entitled to an amortization deduction, just as though the Board had issued certificates for 100% of the costs of the property, when in fact it had not done so, the Court of Appeals did not decide a new issue. Whether the taxpayer was entitled to amortize its full cost or only the percentage of cost certified by the Board was the precise issue before the Tax Court. This question was first raised by the taxpayer's amended petition in the Tax Court proceedings (R. 1–2) and was put in issue by the Commissioner's amended answer which

denied that the taxpayer was entitled to amortize the full cost (R. 3). And, further, the Commissioner argued to the Tax Court that it could not grant amortization in excess of the percentage of costs certified by the Board for, otherwise, it would improperly be exercising the discretion entrusted to the Board.[8]

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[8] The Commissioner's brief in the Tax Court stated (pp. 25, 27):

"The Board, in fact, determined that only certain percentages (Stip. 4, 5, 6, 7) of petitioner's total costs of new facilities represented the excess war costs, and there is no evidence before this Court upon which different percentages could possibly be computed, whether or not such computations were within the province of the Court. * * *

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"After careful consideration, the War Production Board concluded in this case that private acquisition and ownership of the additional machinery and equipment needed by petitioner to increase its output during the emergency period was to the advantage of the Government, if only that portion of the total costs which were attributable to excess war costs could be certified for amortization. Otherwise, the Board might well have decided to acquire the facilities outright with Government funds. The effect of the Court's decision, in *Wickes Corp.* v. *United States*, *supra*, is to substitute its judgment for that of the certifying authority, without having the pertinent factual data before it.

"It is respectfully suggested that the Congress did not intend to grant jurisdiction to the courts to substitute their judgment for that of the designated certifying authorities, with respect to the portions of cost properly certifiable for amortization allowances, as "necessary in the interest of national defense during the emergency period." If that power existed in the courts, the constituted certifying agencies would be deprived of their clear duty to consider and determine what parts, if any, of an applicant's new or enlarged facilities, were to the advantage of the Government to have privately financed."

(*b*) The stipulation of facts introduced by the parties includes an excerpt from the record in *Wickes Corp.* v. *United States,* 108 F. Supp. 616 (C. Cls.), which consisted of an affidavit by Sidney T. Thomas, Chief of the Tax Amortization Branch, Civilian Production Administration (R. 9–19), together with exhibits to the affidavit (R. 19–52). The stipulation states that (R. 7) this "excerpt sets forth the reasons for the percentage limitations appearing on the face" of the certificates issued to the taxpayer.

Since, as shown above at p. 19, *supra,* and in the *Allen-Bradley* brief (pp. 20–25, 52–56) these stipulated facts conclusively show what elements of judgment entered into these partial certificates, and demonstrate that the Board did take into account what it would have cost the Government to issue certificates for a larger percentage of cost, and did consider the possible advantages of alternative, direct Government financing, we submit that the taxpayer is mistaken in contending (Br. 52–56, 60) that the stipulated facts were disregarded by the Court of Appeals when it concluded that the Board had never made a determination of necessity which would authorize amortization of 100% of the costs of the property. The situation is precisely opposite to that described by the taxpayer, for it was the Tax Court, not the Court of Appeals, which ignored the clearly stipulated facts.

(*c*) The taxpayer's suggestion that the case ought to have been remanded to afford it (Br. 55) "an opportunity to improve the record, if it could", is, for the most part, based on the assumptions that the Court of Appeals had improperly decided the case

on the basis of an issue not presented to the Tax Court and had also ignored the stipulated facts. Since these assumptions are groundless, there is no basis for the suggestion of a remand. Furthermore, aside from the fact that the taxpayer had a full opportunity to prove the essential facts at the proper time, i. e., when the case was tried in the Tax Court, there is nothing to indicate that the stipulated facts did not fully and completely disclose the basis on which the certificates were issued.* In addition to the fact that the taxpayer does not even suggest what further facts could be proved, orderly procedure precludes a remand at this late stage merely to permit a party to see whether it "could" improve the record.

We also note that the taxpayer (Br. 57) suggests that it might now be possible to have the Secretary of Commerce, the successor to the War Production Board, issue a certificate covering 100% of the costs of these facilities, and that the case ought to be kept open to permit it to make such an attempt. We will not speculate whether the Secretary of Commerce would or would not undertake to re-examine the discretion exercised by his predecessor more than 12 years ago. We need merely observe that the time for the taxpayer to have made its record was before, not

* It is significant that the affidavit and exhibits used in this case were also relied on by the parties to show what was encompassed by these partial certificates in *United States Graphite Co.* v. *Harriman*, 71 F. Supp. 944 (D. D. C.), affirmed *per curiam, sub nom. United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C. A. D. C.), certiorari denied, 339 U. S. 904; *Wicker Corp.* v. *United States*, 108 F. Supp. 616 (C. Cls.); *Ohio Power Co.* v. *United States*, *supra*; as well as in the *Allen-Bradley case*, *supra*.

after, this case was tried. Indeed, in the petition for rehearing filed with the Court of Appeals on February 29, 1956, the taxpayer, for the first time, had made the suggestion that it be permitted this extraordinary procedure. Significantly, although more than 8 months have since elapsed, the taxpayer still has made no move in this direction.[9]

In its essential aspects, therefore, this case is precisely like *Allen-Bradley*. When the partial certificates were issued, the taxpayer accepted them without challenge. Had it questioned the authority of the Board to issue partial certificates, by instituting prompt and appropriate proceedings in a court of competent jurisdiction, and had it been successful in its contention that the Board lacked statutory authority to issue such certificates, the Board would still have had an opportunity to exercise its discretion and to decide whether 100% certificates should be issued or none at all. The Board might well have decided,

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[9] In view of the nature of the necessity certificates here involved and the governing regulations, it is extremely doubtful whether the Secretary of Commerce as successor to the War Production Board could issue 100% certificates at this time. Thus, Section 4 of the regulations prescribed by the War Production Board, with the approval of the President, provides (8 Fed. Reg. 16965): "The construction, reconstruction, erection, installation or acquisition of a facility will not be deemed necessary within the terms of these regulations unless a determination of necessity is made by the certifying authority *prior to the beginning of the construction, reconstruction, erection, installation or date of acquisition.*" [Emphasis added.]
And, where, as here, certificates have been accepted and construction of the facilities completed, there is nothing in the regulations which contemplates that an applicant can secure a revision of the certificates which were issued.

in view of the added cost of full amortization under private financing and in view of the post-war utility which would have redounded to the Government's benefit if the facilities were publicly financed, that it would be in the interest of the national defense to refuse to issue a certificate and to have the Government finance the acquisition.

Neither the Tax Court nor any other tribunal having jurisdiction to determine a taxpayer's correct tax liability can exercise the discretion entrusted to the Board or can determine what certificates would have been issued if the Board's authority had been successfully challenged. Taxpayer's claim to 100% amortization deductions depends on its having 100% certificates. These it does not have, and its claim must fail. In sum the Tax Court was either required to accept the certificates, with their percentage limitations, as conclusive evidence of the tax basis on which the amortization deductions could be computed, or to hold the certificates invalid in their entirety, in which event the taxpayer would be entitled to no amortization deductions. If the Board was empowered to issue these partial certificates, the Tax Court was in error in allowing a larger basis for amortization than was covered by the certificates. Accordingly, under either view of the case, the Court of Appeals was correct in reversing the Tax Court's decision.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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NOVEMBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956